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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468

* * *

ARTICLE I

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense within Article III, commited within the jurisdiction of the other Party.

* * *

ARTICLE III

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if:

(a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;

(b) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of subparagraph (1)(a) of Article II; and

(c) the offense constitutes a felony under the law of the United States of America.

* * *

ARTICLE IV

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the

requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

* * *

ARTICLE VII

* * *

(5) The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition:

(a) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party, or in the case of a copy by being so certified to be a true copy of the original; and

(b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; and where the requesting Party is the United States of America, by being sealed with the official seal of the Department of State for the Secretary of State; or

(c) if it is authenticated in such other manner as may be permitted by the law of the requested Party.

* * *

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

* * *

APPENDIX B

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

ARTICLE 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

(1) the person arrested or summoned to appear is the person sought;

(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and

(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.

ARTICLE 3

(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority

by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals processes.

* * *

ARTICLE 5

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

* * *

APPENDIX C

18 U.S.C. § 3190

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition cases shall be received and admitted as evidence on such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

APPENDIX D

HONG KONG THEFT ORDINANCE

§ 19(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose;

* * *

he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years.

§ 21(1) Where an officer of a body corporate or unincorporated association (or person purporting to act as such) with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years.

APPENDIX E

28 U.S.C. § 455(a)

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

APPENDIX F

[858 F.2d 1400]

OEN YIN-CHOY,
Petitioner-Appellant,

v.

GLEN S. ROBINSON, U.S. Marshal for the
Northern District of California,
Respondent-Appellee.

No. 87-15055.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 11, 1988.

Decided Oct. 5, 1988.

Cedric C. Chao, Morrison & Foerster, San Francisco, Cal., for petitioner-appellant.

Eric J. Swenson, Asst. U.S. Atty., Dept. of Justice, San Francisco, Cal., for respondent-appellee.

Appeal from the United States District Court for the Northern District of California.

Before TANG, SCHROEDER and NELSON, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal from the district court's denial of a petition for a writ of habeas corpus which the appellant filed to prevent his extradition to Hong Kong. The Crown Colony of Hong Kong seeks extradition of appellant Oen Yin-Choy from the United States to stand trial on six counts of false accounting and one count of publishing a false statement. The extradition proceeding is set against the historic backdrop of the scheduled reversion of Hong Kong from the United Kingdom to the People's Republic of China in 1997. Oen's principal contention is that he cannot lawfully be extradited under the applicable extradition Treaty

between the United States and the United Kingdom. Oen contends that as a result of the contemplated 1997 reversion he may find himself subject to the exercise of China's criminal jurisdiction, in violation of the Treaty. We hold that no part of the extradition Treaty bars the extradition ordered by the district court.

Oen also challenges the sufficiency and admissibility of evidence in the extradition proceeding. Because a certification of extraditability is not a final order, no direct appeal from the decision will lie and review is available only by way of a petition for habeas corpus. *Collins v. Miller,* 252 U.S. 364, 369 (1920); *Caplan v. Vokes,* 649 F.2d 1336, 1340 (9th Cir. 1981). The scope of review in such instances is restricted to inquiring whether (1) the extradition judge had jurisdiction to conduct extradition proceedings; (2) the extradition court had jurisdiction over the fugitive; (3) the Treaty of extradition was in full force and effect; (4) the crime fell within the terms of the Treaty; and (5) there was competent legal evidence to support a finding of extraditability. *Emami v. United States Dist. Court for the N. Dist. of California*, 834 F.2d 1444, 1447 (9th Cir. 1987) (quoting *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978)). *See also Theron v. United States Marshal*, 832 F.2d 492, 495 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2830 (1988). Oen's claims are without merit under the limited standards applicable to review of extradition proceedings.

BACKGROUND

Extradition to the Crown Colony of Hong Kong is governed by the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland ("Treaty"), June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468, and by the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland ("Supplementary Treaty"), ratified and entered into force December 23, 1986 (132 Cong. Rec. S9120 (daily ed. July 16, 1986)).

The United Kingdom leased the New Territories of Hong Kong from China in 1898 for a period of ninety-nine years. Convention of Beijing, June 9, 1898, in 1 *Treaties and Agreements with and Concerning China*, 1894-1919, 130, No. 1898/11 (1921). The remaining parts of Hong Kong were ceded to the United Kingdom in 1842 and 1860. *See* Comment, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 Willamette L. Rev. 327 (1985). All of Hong Kong will revert to the People's Republic of China on July 1, 1997, pursuant to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong with Annexes, Beijing, December 19, 1984, ratified and entered into force May 27, 1985, T.S. No. 26 (1985), Cmnd. 9543 (joint declaration).

These extradition proceedings were instituted on April 15, 1987, by the United States Attorney on behalf of the Government of the United Kingdom and the Crown Colony of Hong Kong. After a two-part extradition hearing, the district court entered a certification of extraditability on September 4, 1987, and subsequently denied the petition for habeas corpus on November 13, 1987.

DISCUSSION

I. *The Lawfulness of the extradition under the Treaty.*

Oen argues that the district court lacked jurisdiction to order his extradition because the Hong Kong Government has not satisfied requirements of the extradition Treaty. His arguments are based upon Article XII(1) of the Treaty which provides that the party requesting extradition, in this case Hong Kong, shall not extradite the fugitive to a third state. It further provides that after being extraditied, the person shall not be charged with any offenses other than the offenses for which the party was extradited. The provision in relevant part reads as follows:

> [A] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in

> respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—(a) until after he has returned to the territory of the requested Party; or (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

Treaty, Article XII(1). The requirement that an individual be tried only for offenses for which extradition has been sought is generally referred to as the principle of "speciality." *See Theron*, 832 F.2d at 496.

Oen first contends that if he is extradited and convicted, he may remain incarcerated in Hong Kong beyond July 1, 1997, the date on which full sovereign control over Hong Kong will revert to the People's Republic of China. He argues that if this scenario occurs, he will in effect have been extradited to China, a third state, in violation of the Treaty.

Even if Oen does remain in prison in 1997, the reversion of Hong Kong to Chinese authority does not result in an extradition within the meaning of Article XII(1). The Supreme Court long ago defined "extradition" as the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within territorial jurisdiction of another, which, being competent to try and to punish him, demands his surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). We adopted that definition in *Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir. 1967). Neither deportation nor surrender other than in response to a demand pursuant to Treaty constitutes extradition. *Id.*; *see also Emami*, 834 F.2d at 1453-54. Therefore, even if Oen becomes subject to Chinese authority pursuant to a reversion of sovereignty upon cession and termination of the British lease of Hong Kong, he will not have been extradited to China.

Oen also contends that if he remains in Hong Kong after the transition to Chinese control, he will become subject to Chinese law and may be prosecuted for additional offenses or be subject to additional penalties in violation of the principle of speciality. He maintains that so long as such a possibility exists, Hong Kong has

not met an implied condition in the extradition Treaty that Hong Kong will guarantee no prosecutions by successor governments. We find no support for such an interpretation.

The Treaty constitutes commitments between the United States and the United Kingdom on behalf of its Crown Colony. It does not purport to include commitments by successor governments or third states. *In re Tang*, 674 F. Supp. 1058, 1068-69 (S.D.N.Y. 1987). Were the Treaty to be interpreted as Oen asks, extradition to Hong Kong would be the exception rather than the rule because it would be limited in practice only to extraditions for crimes which could be punished for a term expiring before the reversion date. There is no indication that the United Kingdom and the United States had any such intention when they expressly made the Supplementary Extradition Treaty applicable to Hong Kong on January 1, 1988, at a time when the impending reversion was fully understood. *See* Exchange of Notes of August 19 and 29, 1986, December 23, 1986, and December 31, 1987.[1]

Oen's contention that Hong Kong has not met the requirements of the Extradition Treaty are groundless; thus, the district court had jurisdiction to determine Oen's extraditability.

II. *Dual Criminality*

Oen contends that his offenses are not extraditable because his conduct failed to satisfy elements of corresponding U.S. offenses.

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[1] In addition, the Joint Declaration between the United Kingdom and China specifically provides that the laws previously in force in Hong Kong shall remain in effect unless they contravene the Basic Law of the Hong Kong Special Administrative Region. (Joint Declaration at 1, 5). The current judicial system will be maintained (*id.* at 5-6), individual liberties are guaranteed and the Joint Declaration explicitly states that the provisions of the International Covenant on Civil and Political Rights, in force March 23, 1966, G.A. Res. 2200A, 21 G.A.O.R., supp. (No. 16) 52, U.N. Doc. A/6316 (1966), and the Covenant on Economic, Social and Cultural Rights, in force January 3, 1976, G.A. Res. 2200A, 21 G.A.O.R., supp. (No. 16) 59, U.N. Doc. A/6316 (1966), shall remain in force. *Id.* at 12, Article 15(1) of the Civil and Political Covenant prohibits ex post facto laws and punishments and Article 14 guarantees rights of due process.

Under the principle of dual criminality, no offense is extraditable unless it describes conduct which is criminal in both jurisdictions. *Emami*, 834 F.2d at 1449. The Treaty at issue here expressly incorporates this principle. Treaty, Article III.

To satisfy dual criminality, the name by which the crime is described in the two countries need not be the same, nor does the scope of liability for the crime need to be the same. *See Emami*, 834 F.2d at 1450. "Rather, dual criminality exists if the 'essential character' of the acts criminalized by the law of each country are the same and if the laws are 'substantially analogous.' " *Theron*, 832 F.2d at 496 (quoting *Wright v. Henkel*, 190 U.S. 40, 58 (1903)). Thus, "each element of the offense purportedly committed in a foreign country need not be identical to the elements of a similar offense in the United States. It is enough that the conduct involved is criminal in both countries." *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986).

The offenses with which Oen is charged, false accounting and publishing a false statement, are listed in the schedule of offenses referred to in Article III of the Treaty. Thus, the Treaty specifically refers to the offenses with which Oen is charged, and the requirement of dual criminality is met. In addition, dual criminality is satisfied because the Hong Kong crimes of false accounting and publishing a false statement are substantially analogous to the federal crime of making a false entry in a bank statement. *See* 18 U.S.C. § 1005.[2] Hence, because the conduct involved is criminal in both countries, the requirement of dual criminality is satisfied. *See Russell*, 789 F.2d at 803. *See also Emami*, 834 F.2d at 1450 (dual criminality found where "[t]he substantive conduct each statute punishes is functionally identical").

Oen argues that the extradition court must make specific findings regarding dual criminality, and that it failed to do so. The extradition record, however, contains sufficient identification of corresponding offenses, as required by *Caplan*, 649 F.2d at 1344.

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[2] Although the U.S. offense is not identical to the Hong Kong offenses, the essential character of the acts criminalized is the same. *See Theron*, 832 F.2d at 496.

III. *Evidentiary Issues*

Oen raises a number of challenges to the evidence, none of which merits lengthy discussion. The most substantial relate to the admission of ten witness statements translated from Chinese into English. Oen contends that the extradition court erred in admitting the ten translated affidavits because they were not sworn statements, as required under the Treaty. Oen also contends that the extradition court erred in denying him the opportunity to review the original Chinese statements that were translated into English, and by failing to consider objections to the competence of this evidence.

The Treaty requires that statements received in extradition proceedings be sworn or affirmed. Treaty, Article VII(5); *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984). Oen essentially argues that because the witnesses could not understand the English translations, any affirmation pertaining to these statements is invalid. The extradition court and the habeas court made clear, however, that they were relying on the translator's affirmations that the witnesses were interrogated and the translations represented accurate translations of the witnesses's statements. Thus, it is irrelevant whether the witnesses's original statements were properly sworn.

Oen next argues that he should be permitted to review the witnesses's original ten Chinese statements. The extradition court concluded there were no original written Chinese statements by the witnesses; rather, the court found that there were only investigator's notes of the statements. The habeas court affirmed this conclusion.

The evidence on this point is unclear. Oen relies primarily on a government affidavit which appears to refer to original Chinese statements. Another affidavit states that evidence elicited from the interviews in Chinese were "recorded in the statement format," and that these drafts were handed to the witnesses for their revisions. However, the affidavits refer only to "statements" made in Chinese without specifying whether or not they were written or oral, and to "conversations" with the witnesses, which suggests there were no written statements. In addition, one police affidavit

states that the police conducted several interviews with certain individual witnesses, which also suggests there never were any original written statements. Because there is conflicting evidence on this point, the court's factual finding that there were no original Chinese statements in writing is not clearly erroneous. *See Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (factual findings reviewed under clearly erroneous standards).

Oen also argues that the extradition court erred by failing to consider over 180 objections to the competency of the government's evidence, including a challenge to the reliability and competency of the ten Chinese translations. The Extradition Treaty between the United States and Great Britain provides that:

> any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition (a) if it is authenticated . . . by a judge, magistrate or other competent authority of the requesting Party . . . and (b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom . . . .

Treaty, Article VII(5)(b). In addition, 18 U.S.C. § 3190 which governs the admissibility of evidence in extradition cases, provides that items offered in evidence

> shall be received and admitted as evidence on such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190.

Oen does not claim that the documents he seeks to exclude were not properly authenticated and certified by the appropriate officials. We have indicated that authentication is the only re-

quirement for admissibility of evidence under general United States extradition law. *Emami*, 834 F.2d at 1451. Thus, Oen's challenges to the reliability and competency of the evidence fail.

Oen argues that the challenged evidence is inadmissible under section 3190 because it would be inadmissible under Hong Kong law. The language of 18 U.S.C. § 3190 requires admission of documents or other evidence "if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped."

We find persuasive the Sixth Circuit's interpretation of section 3190 rejecting a similar contention that evidence must be admissible under the laws of the requesting state. *See O'Brian v. Rozman*, 554 F.2d 780, 783 (6th Cir. 1977). Section 3190 does not on its face require that evidence be admissible in the foreign state. The statute only requires an authentication that would entitle the documents to be "received" for similar purposes in the tribunals of the foreign country. Evidence properly authenticated, proved by a certification of the principal resident United States diplomatic or consular official, "shall be received *and* admitted as evidence" in United States proceedings. 18 U.S.C. § 3190 (emphasis added). Because the evidence in this case was properly authenticated, the district court did not err in refusing to consider the admissibility of the evidence under Hong Kong law.

IV. *Alleged Due Process Violations*

Oen contends that the district court violated his due process rights when it denied his request to cross-examine an individual who submitted an affidavit in support of extradition. However, the Second Circuit has held that there is no right to cross-examination in extradition proceedings. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980). We agree with the statement in *Messina* that

> [a]s has been pointed out repeatedly, "[a]n extradition hearing is not the occasion for an adjudication of guilt or innocence." *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981). The evidentiary rules of criminal litigation are not applicable. *Id.*; *Simmons v. Braun*, [627 F.2d 635,] 636

> [(2d Cir. 1980)]; Fed. R. Crim. P. 54(b)(5); Fed. R. Evid. 1101(d)(3). As in the case of a grand jury proceeding, a defendant has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor. *Charlton v. Kelly*, 229 U.S. 447, 462 (1913); *see United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) [(holding no right to cross-examine in grand jury proceedings)].

Messina, 728 F.2d at 80.

Accordingly, Oen was not denied due process by the extradition court's refusal to allow him to cross-examine.

Oen also contends that his due process rights were violated because he allegedly was not adequately informed of the charges against him. A charge in an extradition proceeding should set forth "clearly and briefly the offense charged," but "[i]t need not be drawn with the formal precision of an indictment." *Yordi v. Nolte*, 215 U.S. 227, 230 (1909) (quoting *Ex parte Sternaman*, 77 Fed. Rep. 595, 597 (N.D.N.Y. 1896), *aff'm sub nom. Sternaman v. Peck*, 80 F. 883 (2d Cir. 1897)).

The warrant of arrest was sufficiently clear to apprise Oen of the charges against him; it stated the ordinances Oen was charged with violating, and set forth some of the basic facts supporting the charges. The fact that the ordinances provide for different types of intent (i.e., false accounting with a view to gain for oneself or for another or to cause a loss to another) does not render the charges invalid. *Cf. Kelly v. Griffin*, 241 U.S. 6, 13 (1916) (failing to object to an extradition complaint which charged "perjury, obtaining money by false pretenses, and, co-jointly, stealing or embezzling and unlawfully receiving money and other property of the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy. . . ."). Thus, the government did not violate Oen's due process rights by giving him the notice it did.

Oen also contends he was denied due process in his extradition proceeding because the extradition court denied his motion for discovery. Although there is no explicit statutory basis for ordering discovery in extradition proceedings, the extradition court has

the inherent power to order such discovery procedures as law and justice require. *See Quinn*, 783 F.2d at 817 n.41. In exercising its discretion to grant or deny discovery, an extradition court should consider that " 'extradition proceedings are not to be converted into a dress rehearsal for trial' and 'whether the resolution of the contested issue would be appreciably advanced by the requested discovery.' " *Emami*, 834 F.2d at 1452 (quoting *Quinn*, 783 F.2d at 817 n.41).

The extradition court did not abuse its discretion in denying Oen's discovery motion. Oen has made no showing that the requested discovery would appreciably advance his negation or explanation of the government's showing of probable cause.

V. *Probable Cause*

Oen contends that there is insufficient evidence to establish probable cause to extradite him. In an extradition proceeding, this court reviews the evidence to determine "whether there was any evidence warranting the finding that there was a reasonable ground to believe the accused guilty." *See Theron*, 832 F.2d at 495. Thus, Oen's appeal on this issue must fail if there is "*any* evidence of probable cause." *Id.* at 501 (quoting *Artukovic v. Rison*, 784 F.2d 1354, 1355-56 (9th Cir. 1986)) (emphasis in original). The Supplementary Treaty defines probable cause as "whether there is sufficient evidence to warrant a man of reasonable caution in the belief that . . . an offense has been committed by the accused." Supplementary Treaty, Article II.

To establish probable cause under the false accounting charges, the record must contain evidence that the loans were false, that Oen knew they were false, and that he intended to gain for himself or for another. *See* Hong Kong Theft Ordinance § 19(1)(a). The affirmation of the accountant who investigated Union Bank provides adequate evidence that the loans were false. In addition, the district court could infer from the record that Oen knew the loans were false. Several affiants stated that all Union Bank's Indonesian loans were Oen's responsibility. In addition, Oen apparently knew of irregularities regarding these loans, representing a departure from normal banking procedure. Finally, Oen was responsible for receiving the money from the false loans,

which was then used to make payments in an allegedly fraudulent offshore deposit scheme. The fact that Oen controlled the Indonesian loans and the offshore deposit accounts, coupled with the evidence that these loans differed in several important respects from normal bank loans, raises an inference that Oen knew the loans were false. Although there is no direct evidence of Oen's intent, his intent to produce a gain for himself and the Bank, or for another company, may be inferred from the structure and result of the transactions. Thus, there is evidence to support a reasonable belief that Oen committed the offense of false accounting.

To establish probable cause that Oen published a false statement, the evidence must show that Oen was a corporate officer who published or concurred in publishing a material statement that is or may be misleading, false, or deceptive, and that he did so with the intent to deceive members or creditors of the corporation. *See* Hong Kong Theft Ordinance § 21(1). There was sufficient evidence to establish probable cause that Oen engaged in publishing a false statement. First, Oen is an officer of the bank. Second, Oen concurred in publishing a statement of the bank's assets which included the false loans. Finally, Oen's intent to publish a false statement may be inferred from the resulting gain to himself and the bank.

VI. *Recusal*

Oen argues that because the same judge presided over both the extradition and the habeas proceedings, Oen was denied meaningful review. The precise issue of whether an extradition judge must recuse in habeas proceedings is an issue of first impression in this circuit. The two other circuits which have addressed this issue, however, have held that a judge who presides over an extradition hearing need not recuse and may hear a habeas corpus action. *See Demjanjuk v. Petrovsky,* 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *David v. Attorney General,* 699 F.2d 411, 416-17 (7th Cir.), *cert. denied,* 464 U.S. 832 (1983).

This court adopts the holdings of those circuits. Federal district judges are frequently called upon to reconsider prior rulings without recusing themselves. *See Withrow v. Larkin,* 421 U.S. 35,

57 (1975) (having the same judge retry a case after reversal does not violate due process); Fed. R. Civ. P. 59 (new trial); Fed. R. Civ. P. 60 (relief from judgment or order); Fed. R. Crim. P. 35 (reduction or correction of sentence). Allowing the extradition judge to review his actions in the context of a habeas proceeding both avoids review by one district judge of the actions of another district judge, and promotes judicial economy because the extradition judge is familiar with the facts and circumstances surrounding the extradition request. Thus, the district court did not err in refusing to recuse itself from reviewing as habeas court its decision of extraditability.

The judgment is AFFIRMED.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF YIN-CHOY OEN } CR-87-32 MISC RHS

Transcript of Proceedings
Friday, August 7, 1987

Before: The Honorable Robert H. Schnacke, Judge

* * *

The Court: . . . [p. 8] I find one other contention of the defense to [p. 9] be of merit, and that is with respect to the translations.

At least some of these documents were originally in Chinese. The normal method of presenting documents to be translated—that require translation is to produce them in the original and then have a translation.

While I am not saying that is the only way in which it can be done, the defense is certainly entitled to see the original and to compare the original to the translation and to verify the translation.

The defense has made a fairly strong case that there are, obviously, areas of I won't say incompetent translation, but translation that raises substantial question about the competency of the translator.

Now, in the cases where the officers interrogated someone—bilingual officers interrogated a witness who spoke only Chinese and put down in answers the English equivalent of what they understood the witness to say, I would think in proper circumstances that could be accepted as appropriate evidence, but not on the signature of the Chinese-speaking witness.

We have English documents signed by Chinese witnesses who concededly could not speak or read or understand English. Now, to me that is a totally meaningless document.

If the officer who took the testimony provides a declaration to the effect reciting what he has done and indicated—indicating if he is—we can sufficiently rely upon [p. 10] his competency to do it in that fashion if he says "these are the product of my inquires [sic] of this witness which he gave me in Chinese and which I wrote down in English and I'm competent to do that," I would think, even though no original Chinese transcript of that conversation is available, I could accept the officer's declaration to the effect that that did occur and that information was provided.

It is not the best way to do it, but it is certainly a reasonable way to get such testimony. We don't have that.

And with respect to the documents that have been translated, I think there is no doubt of the fact that the defense is entitled to see, prior to a determination here, the original of those documents and to test the translations. As I say, the case they have made for that is pretty strong.

* * *

[p. 11] The Court: Well, are there affirmations that were originally in the Chinese language?

Mr. Chao: As to all the nine affirmations that are referred to in our motion, it is my understanding from their response that there is nothing in Chinese. All they have is a translator's version of testimony, which we find to be totally inadmissible.

* * *

[p. 12] The Court: I would say this, if I had the affirmation of the accountant and if I had the affirmation of the officers who took the testimony of the Chinese-speaking witnesses reciting those facts that I have indicated heretofore, I would [p. 13] find the showing sufficient to establish probable cause.

The fact that some day Hong Kong may be subject to some laws other than the laws it is subject to now strikes me as dealing in speculation, and I don't think that is a basis for thinking that

this case could some day be punished by the death penalty. I think that is reaching pretty far.

Mr. Chao: I would be prepared to address that.

The Court: It is an ingenious argument and a fascinating one, but not one that is persuasive.

Mr. Chao: I would be prepared to address that at the hearing, I guess, on the 17th.

If I could address the nine affirmations which your Honor has raised. I think even if—the government has admitted they do not have any original Chinese version of those nine witness's [sic] testimony. All they have is a translation, an English translation. Places are incoherent. The grammar is incorrect. The syntax is incorrect. It doesn't make sense in other places.

It would have been relatively easy for the government to have done it correctly, i.e., to have the witness prepare an affidavit in Chinese, then prepare an English translation and then it—we would have, the defense would have had its right, its ability, to test the accuracy. Or alternatively, they could have recorded by tape recording process—

The Court: I realize there are many things they could [p. 14] have done. We are dealing with what they did do.

I am finding that that is not an unreasonable presentation here, provided it is adequately supported by declarations to show that it was done and by someone competent to do it.

Mr. Chao: If your Honor is permitting the government to supplement its submission with an affidavit from the translating officer, will it be open to the defense to, upon examining such affidavit, to submit further briefing to your Honor as to that adequacy? I don't know what they are going to put—

The Court: I don't know either. I'm assuming they are going to be adequate affidavits. And if some items are not adequately covered, we will have to consider whether they create a sufficient gap in the proof to interfere with the extradition.

I am inclined to doubt—well, I won't speculate about that. In any event, those two contentions by the defense are accepted, and to that extent the defense motions are granted.

The remaining contentions I think are not supported by the law, and the remaining motions will be denied.

* * *

[p. 18] CERTIFICATE OF REPORTER

I, Roberta L. Rogers, official reporter, for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, do hereby certify that the foregoing transcript, pages numbered 2 through 17, inclusive, constitutes a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

_____

Roberta L. Rogers, CSR

APPENDIX H

[Filed August 14, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY	Criminal No.: CR 87-0082-MISC-RHS ORDER RE OEN YIN-CHOY'S PRE-HEARING MOTIONS

OEN YIN CHOY submitted six pre-hearing motions in these extradition proceedings. These motions came on regularly for hearing before this Court on August 7, 1987. Having considered the documents, memoranda, and argument presented by counsel for the parties and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

1. OEN YIN-CHOY's motion to strike and exclude Grimsdick's Affirmation and Accountants' Report is denied in part and taken under submission in part. The Grimsdick Affirmation will be admitted into evidence. The Accountants' Report does not appear to comply with the requirement of Article VII(5) of the United States-United Kingdom Extradition Treaty that evidence be given on oath or affirmed. Therefore, pursuant to Article IX(2) of the United States-United Kingdom Extradition Treaty, the Hong Kong government must submit an affirmation from John Michael Henley Grimsdick sufficient to meet the requirement of Article VII(5) of the Treaty in regard to the Accountants' Report. Such further affirmation must be filed with the Court and served upon Mr. OEN's counsel no later than 12:00 noon, August 17, 1987.

2. OEN YIN-CHOY's Motion to Produce Cantonese Originals of Government Affirmations or, in the Alternative, to Exclude English Translations is also taken under submission. On the basis of the memoranda filed by the parties with regard to this issue, a question has arisen as to whether the English only affirmations submitted by certain witnesses, who apparently do

not speak English, have been given "under oath or affirmation" as required by Article VII(5) of the Treaty. Therefore, pursuant to the provisions of Article IX(2) of the Extradition Treaty, the Court is hereby requiring the government of Hong Kong to provide declarations from Hong Kong officers and officials explaining why Cantonese original translations were not submitted with the Extradition Request and describing the circumstances leading to the submission of English only affirmations by witnesses Or Mui- chu, Yueng Yun-tong, Lee Yue-wing, Lee King-mo, Lai Kwo- pui, Tsang Fung-kwan, Chung Lin-shing, Wong Mui, and Liu Shih-kun. Such affirmations must be filed with the Court and served upon Mr. OEN's counsel no later than 12:00 noon, August 17, 1987.

3. OEN YIN-CHOY's remaining four motions, the Motion to Strike and Exclude Evidence, the Motion to Strike and Exclude Affirmation of Lulu Yui, the Motion to Dismiss Request for Extradition for Failure Adequately to Inform Oen Yin-choy of the Charges Against Him, and the Motion for Discovery, are denied.

4. The hearing on plaintiff's request for extradition, previously scheduled for August 17, 1987, is hereby rescheduled for August 31, 1987 at 10:00 a.m.

5. Upon stipulation of counsel, Mr. Oen may file and serve his Opening Memorandum setting forth any argument resulting from the government's further submission no later than the close of business, August 21, 1987; the government may file and serve any response thereto no later than the close of business, August 26, 1987; and Mr. OEN may file and serve any reply thereto no later than the close of business, August 28, 1987.

IT IS SO ORDERED.

DATED: Aug 14, 1987

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge
for the Northern District of
California

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF YIN-CHOY OEN } CR-87-82 MISC RHS

Transcript of Proceedings
Monday, August 31, 1987

Before: The Honorable Robert H. Schnacke, Judge

* * *

[p. 2] Mr. Chao: Yes, please, your Honor. If I could take up the translation motion first.

At the last time we were here, your Honor, the Court ruled that Mr. Oen is entitled to the Chinese originals of the statements of the ten witnesses at issue here.

The Court also said that the ten translations in English provided to the Court were totally meaningless documents. I believe those are the words of the Court.

The Court: Without adequate support.

Mr. Chao: Based on the understanding, or at least certainly my understanding, that there was nothing in Chinese, the Court provided the government the opportunity to submit supplemental affidavits to explain the procedures whereby they arrived at the ten translations which are submitted to the Court.

[p. 3] These supplemental submissions to the Court, however, revealed that, in fact, each of the ten witnesses at issue there are original written Chinese statements. That admission by itself, your Honor, warrants the production of those original Chinese statements. We thought they did not exist. In fact, they do exist. And given the Court's—

The Court: What do you understand those statements to be?

Mr Chao: I understand those to be the statements written in Chinese.

The Court: By whom?

Mr. Chao: By—I guess they were written by either the agent or the witnesses themselves. But I understand they were subscribed to, reviewed by the witnesses themselves. So they were adopted by the witness. And those are the source documents for the ten translations which are before your Honor. Those are the documents that we are entitled to compare against the ten translations before the Court.

The Court: Are there such documents, Mr. Swenson?

Mr. Swenson: No, there is not, your Honor. I'm not sure how we could make it any clearer. It was like any criminal investigation, there were people interviewed as part of that investigation. And what Mr. Chao is calling original Chinese versions, there were original Chinese statements made from the first time these various witnesses were interviewed. The [p. 4] English translations were made of those for the other police officers and the prosecutors.

Those statements were taken having nothing to do with this extradition request. They were purely a part of the initial investigation.

And as the affirmation of Mr. Ip and Ms. Yui indicate that there was a process that was followed from that arriving at the English affirmations that were submitted with the extradition request.

And those English affirmations—there is no comparable Chinese original of that particular statement because what was initially put down in Chinese was subsequently added to as the investigation continued and new information became available.

So we submit our position has been consistent throughout and that the only thing that was any different was that these original Chinese statements—we never claimed there weren't such things. There just weren't any exact translations of what was submitted with the extradition request.

The Court: I guess there is no doubt of the fact that they will be—they would be under the American system producible as initial statements made by the witnesses or parties.

Mr. Swenson: Jencks act type material.

The Court: But they are not—they are not the precise basis for the declarations or affidavits that we have here.

Mr. Swenson: That's correct.

[p. 5] Mr. Chao: I would like to, if I could, point your Honor to the government's own affidavit from Lulu Yui. This is at page 4 of her supplemental affirmation. She says as follows:

"All these witnesses had by March 1987 provided statements in the Chinese language."

She goes on to say that the statements had been translated—

The Court: She does not say written statements.

Mr. Chao: I understand those are written. And if I am incorrect in that, I assume I will be corrected by the government. She goes on to say that these statements had been translated into the English language—

The Court: Statements do not mean written statements unless it says written statements. Do you have some evidence that they are written statements?

Mr. Chao: I understand they are. Are they?

Mr. Swenson: The initial, the very first interview, was a written statement in Chinese that the—

The Court: First of all, is everybody stipulating that all of the witnesses read and write Chinese?

Mr. Swenson: They do all read and write Chinese, that's correct, the ones in question here.

Mr. Chao: I have no basis to know one way or the other, but I presume so.

If I could go the next sentence further, your Honor, to [p. 6] show that the basis—Ms. Yui said that all affirmations of the

witnesses in the case were prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

That shows, I submit, that the translations before this Court are derived from those original Chinese statements, which the English—

The Court: There are other affidavits that indicate that that isn't always so; that there have been alterations, corrections, amendments, changes. As the investigation developed, they culminated in a final affidavit.

Mr. Chao: But if there were—

The Court: Do we have the declaration of a person who says under oath, "I talked to the witness. The witness explained to me what happened in Chinese. I put it down in English. I translated the English that I had put down into Chinese. The witness affirmed that that was so. And what we have presented to the Court on my oath are the Chinese statements of the witness translated into English"?

Mr. Chao: We do not, your Honor. With respect to only one of the ten witnesses has there been any affirmation from the government even approaching what your Honor has stated. As to the other nine of the ten witnesses, there was no such statement saying, "I am in a position to know that what is in the English [p. 7] translations before the Court accurately and truthfully represents, you know, paragraph by paragraph, what the statement—what the witness had originally testified to either in the interview process or what have you.

The Court: There is an indication that at some point somebody else was observed or heard to be reading something to a witness and the witness agreed that in signing it that it seemed all right to the witness.

Mr. Chao: I think there was, if I understand—

The Court: I have no way of knowing that the witness had any idea what the witness was signing at that point, either from

the witness' affidavit or from the affidavit of the person who took the signature.

Mr. Chao: I think your Honor is correct, we do not have any basis to know. And in fact, these witnesses—there is no way a witness who does not read English can attest to the English translation before the Court or attest to—

The Court: The translator has to attest to that. As I understand it, the translator has not done that.

Mr. Chao: There is a magistrate—a translator to assist the magistrate. And they in conclusory form say—

The Court: I have a strong suspicion that everything that ought to have been done was done, because it seems pretty clear that everybody was being very careful.

But it does not seem to me to have been—unless I have [p. 8] missed something—to be described as having been done. And that's what disturbs me.

I can't put my finger on anything that convinces me by the oath of any witness that the witness in signing the English document had reason to know at that point what that document said in a fashion that he could understand.

Now, maybe I am wrong about that. But that's my present view.

Mr. Conyngham: I wonder if I could possibly—

The Court: Sure.

Mr. Chao: I think your Honor is correct in that.

The Court: Counsel is going to point out what I have missed.

Mr. Conyngham: Your Honor, the affidavits from the Chinese language officer, Choi Chow Wai-Chung states at paragraph 4 that "on the dates listed thereunder at central magistracy, Hong Kong, I truly and fully translated to the following persons from English into Cantonese their respective affirmations/affidavits in these proceedings," and she lists the ten witnesses.

The Court: They were not signed at that time.

Mr. Conyngham: No, your Honor, they weren't.

Then if we go to the additional affidavit now from the magistrate's interpreter, Mr. Poon Chui-Keung, he says at paragraph 4:

> [p. 9] "I well and truly orally translated from English into Cantonese and from Cantonese into English, as appropriate, to the best of my skill and understanding the following conversations between the magistrate Warner Bernard Greville Banks and each of the affirmants named in paragraph 3. Warner Bernard Greville Banks asked each affirmant whether their name, address and occupation was as stated in the affirmation."

They quite clearly were talking about that witness' affirmation at that time. Whether the said affirmation had previously been translated for them from the English language to the Cantonese language and whether they solemnly and sincerely—

The Court: Let's say you are presented with a document in Lithuanian and you have seen a document that looks something like that before, and the magistrates says, "is this the document that was translated to you?" How do you know? How do you know that it is the same document?

Here is a document pulled out of a file in a strange language presented to a witness who doesn't understand the language. It is not translated, except insofar as the name and address is concerned, apparently. Does that document have the oath or affirmation of the translator on it?

Mr. Conyngham: The interpreter, court interpreter, [p. 10] identifies which ones—which affidavits he was talking about. He lists the same ten witnesses.

The Court: Is that correct?

Mr. Conyngham: Yes. At paragraph 30:

> "The first and second days of April '87, I was acting in my capacity referred to in paragraph 1 of this affirmation and was present when the persons listed hereunder made their affirmations."

And he lists the same ten witnesses over that two day period.

The Court: You have got the same people there—

Mr. Conyngham: But, your Honor, there is also—

The Court: Do you have the same affirmations there?

Mr. Conyngham: Well, your Honor, I agree you may rely on good faith. There was also the evidence from Chief Inspector Ip that the bank's staff—and there was about four bank staff out of these ten people—did speak and read some English. They were just basically more comfortable in Cantonese.

I would have thought it would have been reasonable to suppose that as bank staff and senior bank staff, these people—they could identify their names, their addresses in English.

Hong Kong is an international banking community. A lot of banking has to be done in English. Clearly they could not operate in that capacity without having some basic [p. 11] understanding.

Mr. Chao: To address that, your Honor, we are talking about, for example, in Mr. Lee Yue-Wing case, a 35-page affidavit and in Mr. Or's case, a 27-page affidavit. If they are not completely comfortable in English—if they were completely comfortable in English, they would have presumably done that—

The Court: We know that affidavit was translated for him.

Mr. Chao: We don't know whether it was accurately translated. As your Honor has held, we have the right under the case law that we have cited earlier to compare the originals against what is submitted to the Court for accuracy.

And I submit that given the government's admission that in fact the original Chinese statements have discrepancies with respect to the translations before the Court—

The Court: There is no Chinese statement, as I understand it. They were simply investigator's notes. And they are not what is presented to this Court as support for an extradition authorization.

Mr. Chao: I would point the Court—

The Court: I look upon those as irrelevant.

Mr. Conyngham: Your Honor, this does happen—

The Court: The only question in my mind— First of all, let me say for my own purposes I am completely satisfied [p.12] that the affidavits or declarations are in fact those of the persons whom they purport to be taken of; that they are satisfactorily translated.

But that is, in large part, possibly because I am accepting the bona fides of everybody connected with the case. And it rather appears as if they did everything that appeared to them appropriate to present these things in a proper fashion.

What we have missing here, if anything, is a careful adherance [sic] to what we might call the chain of evidence in the United States, and the documents don't get properly identified at each step of the procedure.

But it does appear that reasonable steps were taken to ascertain that the documentation was accurate; that everything that bears upon that was reviewed [sic] by the magistrate by competent translators; that it was not put together simply by the police department. And that we have here, I think, are affidavits of the kind that sufficiently comply with the requirements of the treaty to be acceptable in support of the application for extradition.

The gaps are not serious ones. They don't go to the foundation admissibility of these documents. And I'm satisfied that they can be received. So with respect to those declarations, the motion will be denied.

Mr. Chao: Your Honor, would your Honor permit me to examine inspector Lulu Yui, who was [sic] submitted a declaration in [p. 13] support of this translation motion?

Mr. Swenson: We would strongly object to that. We would object to that.

Mr. Chao: She is present in court today. She presented her examination—testimony on direct examination, and it is no great inconvenience to the government for me to cross-examine her.

Mr. Swenson: We believe it is, your Honor. It is attempting to offer contradictory evidence, which is not—

The Court: I don't think he is trying to contradict any evidence. He is trying to establish whether or not there is any evidence. I suppose that's appropriate. What is she going to say?

Mr. Chao: I don't know what she is going to say.

The Court: If you don't know what she is going to say, you shouldn't be putting her on the witness stand.

Mr. Chao: I would like to put her on the witness stand and go over her declaration that she submitted to the Court to go into the interview procedures, to go into her note-taking procedure, to examine these witness statements, the original Chinese witness statements, what the basis was and how they were changed.

The Court: I don't think that would be productive.

* * *

[p. 16] The Court: All right. So I will issue the appropriate [p. 17] order for this matter to proceed towards extradition.

Mr. Carlson: Your honor, we would like to address the merits of the extradition at this time. We think there is significant questions regarding probable cause and regarding the other issues that we have raised.

The Court: Probable cause is written all over the case. I don't even think that justifies argument.

Mr. Carlson: Well, your honor, we would appreciate the opportunity to argue the point. We are prepared to do so today. There are 17 volumes—

The Court: I have your written submission on it. It is clear to me that there is probable cause.

Mr. Carlson: Additionally, your Honor, we would like to address the other issues we have raised, the issues about the appropriateness of the treaty, and Mr. Chao is prepared to address that.

The Court: I denied that last time.

Mr. Carlson: That wasn't before the Court last time.

The Court: It was before the Court, the matter of the Chinese takeover.

Mr. Chao: That's correct. I believe your Honor did make comments to the effect—I did not have the opportunity to argue at the time.

The Court: Those matters were all before me. I denied all motions last time, except for these two matters that I said [p. 18] would be left open, and giving the government the opportunity to file further support.

Mr. Carlson: We had not raised those—those were not motions that were on calendar for that day. We did not address them, and would at this time—

The Court: They were all addressed in the papers.

Mr. Carlson: They were addressed in the papers. We would like the opportunity to address them, but of course it is up to your Honor.

The Court: Well, go ahead, briefly.

Mr. Chao: Thank you. I will be—I would like to address first the treaty.

The Court: I have ruled on the government of China takeover in a few years, and that that [sic] does not interfere with the propriety of this extradition. That I will not listen to further argument on.

* * *

[p. 36] CERTIFICATE OF REPORTER

I, Roberta L. Rogers, official reporter, for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, do hereby certify that the foregoing transcript, pages numbered 2 through 35, inclusive, constitutes a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

/s/ ROBERTA L. ROGERS
Roberta L. Rogers, CSR

APPENDIX J

[Filed Sept. 4, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY A Fugitive from the Crown Colony of Hong Kong.	CR 87-0082-MISC-RHS CERTIFICATION OF EXTRADITABILITY

This matter came on for hearing August 31, 1987, pursuant to Title 18, United States Code, Section 3184, following the provisional arrest of defendant OEN YIN-CHOY upon formal request of the Crown Colony of Hong Kong. A Warrant of Arrest has been issued by the Hong Kong Magistrate's Court, dated February 20, 1987, charging OEN with six counts of the crime of False Accounting, in violation of Section 19(1)(a) of the Hong Kong Theft Ordinance, and one count of Publishing a False Statement, in violation of Section 21(1) of the Hong Kong Theft Ordinance.

The Court, having considered the evidence, including affirmations and supporting documents presented by the United States on behalf of Hong Kong, the many memoranda submitted by both parties, and argument of counsel, finds as follows:

1. Criminal charges are pending against defendant OEN YIN-CHOY alleging the crimes of False Accounting and Publishing a False Statement, violations of the Hong Kong Theft Ordinance. A Warrant of Arrrest, dated February 20, 1987, has issued from the Hong Kong Magistrate's Court. The acts upon which the Hong Kong charges are based are proscribed as felonies by similar criminal provisions of United States federal law;

2. The crimes with which defendant OEN is charged in the Magistrate's Court of Hong Kong are inclued in the provisions of Article III and accompanying schedule of the 1972 Extradition Treaty between the United States of America and the United Kingdom including the Crown Colony of Hong Kong, which Treaty is currently in force;

3. The defendant OEN YIN-CHOY who is before this Court is the same individual charged in the Warrant of Arrest issued by the Hong Kong Magistrate's Court and is the subject of the Request for Extradition by Hong Kong.

4. The evidence before this Court establishes probable cause that defendant OEN committed the crimes alleged in each of the seven counts in the Warrant of Arrest, and the evidence is sufficient, in that probable cause has been established, to sustain the charges for which Hong Kong seeks extradition under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

For the foregoing reasons, this matter is certified to the Secretary of State, together with a copy of all evidence admitted before this Court, in order that a warrant may issue upon the requisition of the proper authorities of Hong Kong for the surrender of said OEN YIN-CHOY, according to the provisions of the Treaty between the United States of America and the United Kingdom.

IT IS FURTHER ORDERED that the attorney for the United States shall obtain transcripts of all hearings before this Court and shall deliver forthwith the said transcripts of such hearings to the Clerk. The Clerk shall forward to the Secretary of State a copy of this Certification and Order together with transcripts of these hearings and copies of all affirmations and supporting documents received as evidence.

DATED: [undated]

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge
for the Northern District of
California

APPENDIX K

[Filed Oct. 6, 1987]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

OEN YIN-CHOY,
Petitioner,

vs.

GLEN S. ROBINSON,
United States Marshal
for the Northern
District of California,
Respondent.

C-87-4705-RHS

ORDER

Petitioner's motion to disqualify the undersigned judge pursuant to 28 U.S.C. § 2441 fails to state any grounds sufficient to suggest that this Court's impartiality might reasonably be questioned. Petitioner, with commendable candor, concedes that the only two circuit courts to have considered his contentions have found against them. *David v. Attorney General*, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983); *Demjanjuk v. Petrovsky*, 612 F. Supp. 571, 575 (N.D. Ohio 1985), 776 F.2d 571 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 1198 (1986).

The motion is denied.

Dated: October 5, 1987

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

APPENDIX L

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before the Hon. Robert H. Schancke [sic], Judge

OEN YIN-CHOY,
Petitioner,
vs.
GLEN E. [sic] ROBINSON, United States Marshal for the Northern District of California,
Respondent.
C-87-4705-RHS

Transcript of Proceedings
Friday, November 6, 1987

* * *

[p. 6] Mr. Chou [sic]: I would like to address, your Honor, the motion to—it's really the incorrect admission of the ten English translations. This goes to the competence of that [p. 7] evidence. And without that evidence, I don't think there is any question that there wouldn't be any basis for probable cause whatsoever.

I think it's helpful to review the process which the government's own affidavits establish.

The Court: I am aware of the process. The process came about in partial response to my suggestion that there be additional evidence to satisfy this Court that there was a basis for accepting those statements; that they did conform to a reasonable presentation by a person under oath of what had transpired and what had been said.

The ten statements appear to me to be appropriately documented to be the kind of evidence that can be relied upon in an extradition hearing. I am satisfied that they measure up to the treaty requirements.

Mr. Chou: If I could point out to the Court that in the first go-around, the extradition court's observations were correct. This Court observed that, one, the defense is entitled to see the original and to compare the original to the translation and to verify the translation.

The Court: Then we learned that there was no original.

Mr. Chou: In fact, your Honor, the government's own affidavits—Lulu Yui's affidavit establishes that there was—there were original Chinese statements.

The dispute between us and the government was, were [p. 8] those documents the source for the translations which were presented to this Court. In fact, Lulu Yui's affidavit, and I will quote verbatim from her affidavit, establishes that they were the source for translations put forth to this Court.

Miss Yui says at paragraph 6 of her affidavit:

> "I was instructed by Chief Inspector Ip Lau-Chuen that all affirmations of witnesses in the case were to be prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided."

That, your Honor, I submit, shows very clearly that those Chinese written statements, which the government concedes—now concedes exist—were the source documents for the translation.

The Court: This is one part of her declaration.

Mr. Chou: Your Honor also observed at the first go around that an English translation—

(Simultaneous Colloquy)

The Court: I did hope that there was another way of presenting the material. And we discovered later that that was not so.

Mr. Chou: Well, under those—

The Court: I did hold, and I think properly, that what was supplied was acceptable under our rules of evidence as a [p. 9] statement, sworn statement, as to what the witnesses had said.

Mr. Chou: The hole in that, your Honor, is that the witness, the Chinese witness who can't read or right [sic] English who put his name—

(Simultaneous Colloquy)

The Court: We are not relying on the name that the witness put down. We have testimony that the witnesses were interrogated and that this is what the witnesses said. In the circumstances of a witness that can't read or right [sic], that is the best you can do.

Mr. Chou: The problem, your Honor, is that the witness has no way of knowing whether the translator who supposedly translated this English documer ..

(Simultaneous Colloquy)

The Court: We are relying on the oath of the translator, which we do all the time. I am trying a case now in which most of the witnesses speak some obscure Chinese dialect. I don't know whether the witnesses are saying what the translator tells me that the witness is saying.

Mr. Chou: There is case law—

The Court: I have to rely on the translators to tell me that.

Mr. Chou: But there is case—

The Court: That is what we have done here, in effect.

Mr. Chou: Your Honor, there is case law which we have [p. 10] cited in the papers below for two propositions. One is your Honor has so observed the accused does have the right in an extradition proceeding to challenge the accuracy of the translations.

I submit, your Honor, since there is an original Chinese statement— maybe it is not verbatim the same, but that is all the

more reason why it should have been produced. Under those circumstances, I submit, it was error either not to either exclude the English documents or to provide the originals to permit a comparison of one with the other. Then to permit us to—

The Court: We did not rely on the translation of those documents. Those documents were peripheral. What we relied on was the statement, in effect, of the interpreter that these were the assurances and these were the things stated by the witnesses.

Mr. Chou: Well, your Honor, I don't believe it's quite as clear-cut as that. I also believe—we cited the case of Gonzalez versus State that it is error for the trial court not to—in a trial setting not to appoint an unbiased, impartial interpreter for the defendant at trial.

The person who did the translation orally was not an unbiased party. In fact, it was an employee of the government. I think that is another error in going into the translations, your Honor. There was no harm, would have been no harm—

[p. 11] The Court: I find no error there in the acceptance of those ten statements.

Mr. Chou: If I could make one additional point which is related. It goes to the opportunity to cross-examine agent Lulu Yui. She submitted the affidavit, which, as you recall, I just quoted from.

The language in paragraph 6, I submit, shows that these translations were the result of a process which originated with the original Chinese statements.

The government stood up at the extradition hearing and argued, and apparently prevailed upon the extradition court, that, no, it's a different document. These were merely agent's notes.

Well, in fact, I think that's totally undercut by the very words of Lulu Yui's affidavit. And that is one of the key issues we sought to cross-examine Lulu Yui on.

I think that the government's only basis in arguing in this petition for Habeas Corpus for saying it was not error to permit cross-examination of Yui was their statement that Miss Yui was

not a "witness," because she submitted testimony by affidavit as opposed to being called live to the stand.

Frankly, it's hard to respond to, because whether you submit testimony by an affidavit or in person, you are a witness. And the rationale for not allowing cross-examination of affidavit witnesses was not present here.

[p. 12] I understand there is case law which says if there is a witness in Hong Kong, the government will not be forced to fly the witness to the United States to be cross-examined. However, Miss Yui, on her own, had been present in this courtroom at least two times. It would have been no trouble whatsoever to have had her on the stand for half an hour. And there was no reasonable—

The Court: That was never presented to me in those terms during the extradition hearing that she was here and available and that you had subpoenaed her or had her available to put on the witness stand.

Mr. Chou: Well, it's their witness.

The Court: You did make a general request. I was not aware of the fact that she was in the United States.

Mr. Chou: Miss Yui was sitting right here at counsel table, your Honor, and I asked she be cross-examined. And Mr. Cunningham, who was the Hong Kong prosecutor, was also present. It was very clear that Miss Yui was right here in the courtroom.

In fact, your Honor, at first, indicated you would allow her to be cross-examined. You indicated there was no reason not to have her cross-examined.

At that point the government stood up and strenuously objected. Their basis for objecting was that it was contradictory evidence as opposed to explanatory evidence. And [p. 13] I think your Honor at that point correctly observed that, really, the focus of the examination was to go to the competency of the ten translations.

So I believe your Honor is mistaken. She was present in the courtroom.

The Court: I am sure she was, if you tell me she was. I am not sure that that issue was presented to me in that way at that time.

In any event, did I prevent you from calling her?

Mr. Chou: Your Honor, after the objections of government counsel, then reversed your initial inclination and said you would not have her examined. And I believe that I did lay out, and it is in the transcript, I made a proffer of proof of the reasons I wanted to go into. I was at that point arguing from her very own affidavit, making my point on the competency of the ten translations.

Mr. Swenson: If I might clarify that. Mr. Chao was asked what she would testify about. And he said he didn't know. The Court ruled if he didn't know what she was going to testify about, then she can't testify.

Mr. Chou: That is taken out of context. As I said in our reply papers, your Honor, I don't know—I cannot predict what her responses will be. Obviously, if I'm going to cross-examine Lulu Yui, I expect to get admissions out of her to establish my very points on the competency of the translations. [p. 14] It was a truthful answer when I said to your Honor "I do not know what her responses will be." I then went on to say, and made a proffer of proof of the items I intended to examine her on.

I will quote from page 13 of the transcript, line 17 through 22.

> "Mr. Chou: I would like to put her on the witness stand and go over her declaration that she submitted to the Court to go into the interview procedures, to go into her notetaking procedure, to examine these witness statements, the original Chinese witness statements, what the basis was and how they were changed."

As you recall, Miss Yui indicated that as to each of the affirmations or translations that were submitted to the Court, she had altered them. She called it stylistic. She changed a word order. She changed the grammar. She moved subjects and verbs around to make it more coherent.

It has always been our position consistently throughout this motion that that is the type of change of testimony that gives rise to the accused's right to see the original statements. That is—

The Court: Can anyone translate from Mandarin to English without doing that?

Mr. Chou: Sorry?

The Court: Can anyone translate from Chinese to [p. 15] English without doing that?

Mr. Chou: It may be necessary. I do not deny, your Honor, that there may be times when it's necessary to change that, but that gives a right to see the originals.

The Court: The Chinese language, if the statement is that the man went to town, the Chinese use a symbol for man and the symbol for going and the symbol for town, and nothing to indicate whether he went at some earlier time, whether he is on his way right now or whether he intends to go at some time in the future. In any event, there has to be this kind of interpretation by the translator.

Mr. Chou: I am not denying that. What that points out, and as we established with our expert affidavit in support of the motion, the translation process between Chinese and English is one of the most difficult translation processes, much more difficult than, say, French to English. That is why in this case, more than other cases, there was a need to compare the originals against the final, especially where the witness, in the end, had no way of knowing if the final English translation was correct or not.

I don't dispute that there will be changes necessary. But Miss Yui is not a professional translator. The danger is that in being the main case agent is in an interest in seeing whatever the government's ends be achieved, that there is where inaccuracies arise and can creep into the process.

[p. 16] If the translation process was fine, there would be no reason for the government not to provide original statements. And if there were notes associated with the change from the original

statement, the evolution from the original statement to the final English affirmation, there is no reason not to supply those as well.

The Court: All right. . .

* * *

[p. 18] Mr. Chou: As far as Mr. Grimsdick's allegations, we submitted an affidavit from a partner at Arthur Young who in fact is so well respected by the government in Hong Kong that they have used him as an expert witness in their own cases. This Mr. Mace—

The Court: I am sure that will be valuable evidence at the trial, I have no doubt. But we don't take conflicting evidence here.

Mr. Chou: The standard is, your Honor, that if it totally negates probable cause, then that is admissible. And in fact it is admissible. If it totally negates probable cause or obliterates it, which we submit it did, then that is considered explanatory and is properly admissible.

Mr. Grimsdick's conclusions regarding loan falsity lacked a proper commercial or logical basis. Among other [p. 19] things, Mr. Mace noted that the government's banking commissioner named Jonathan Newman, he went to Indonesia. He went to see this borrower, Sinar. He saw them in the flesh. And Sinar, the borrower, explicitly acknowledged the loan. Not only did they acknowledge the loan, they didn't question the loan disbursements. They didn't say the loan was false, and they in fact expressed a desire to repay.

Not only there—

The Court: There is no indication he had any assets to repay it with, of course. It was a false loan because it was not properly identified to the bank, and it was not made known to the bank that the borrower was not going to have any money to pay it back.

Mr. Chou: I believe the Court is mistaken. There is not allegations that the Sinar didn't have any assets to repay.

The Court: No, there is no allegation of that. The allegation was it was a false loan.

Mr. Chou: The problems you are speaking to is a problem of ability to repay on time. That goes to a bad loan, not to a false loan.

The Court: That goes to a false reason if the bank is led to believe something to the contrary. As I say, these are factual disputes that can be raised before the trier of fact. There is certainly evidence before this Court that it was a false loan.

[p. 20] Mr. Chou: Sinar made two repayments on the loan, your Honor. If there was a false loan, that was made with without the borrower's knowledge, why would they make repayments and explicitly acknowledge the loan?

The Court: You have a misconcept of what constitutes a false loan. But go ahead.

* * *

[p. 51] CERTIFICATE OF REPORTER

I, Lawrence J. White, official reporter for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify that the foregoing transcript pages numbered 2 through 50 constitute a full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

Lawrence J. White, CSR

APPENDIX M

[Filed November 12, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY A Fugitive from the Crown Colony of Hong Kong.	CR 87-0082-MISC-RHS AMENDMENT TO CERTIFICATION OF EXTRADITABILITY

Upon remand of the matter to this Court from the Court considering defendant Oen's petition for a writ of habeas corpus, and upon further review and consideration of the evidence submitted in this matter by the United States on behalf of the Crown Colony of Hong Kong, this Court finds that paragraph 4 of its Certification of Extraditability, dated September 4, 1987, should be amended. Wherefore,

IT IS HEREBY ORDERED that paragraph 4 of the Certification of Extraditability is and shall be stricken and is and shall be replaced by the following:

"4. a. For each of counts one through six in the Warrant of Arrest:

"(1) The evidence before this Court established probable cause that defendant Oen committed the crime defined in Section 19(1)(a) of the Hong Kong Theft Ordinance of false accounting "with a view to gain for himself or another," and the evidence is sufficient, in that probable cause has been established, to sustain extradition on the charges of false accounting with a view to gain for himself or another under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

"(2) The evidence before this Court did not establish probable cause that defendant Oen committed the crime defined in Section 19(1)(a) of the Hong Kong Theft Ordinance of false accounting "with intent to cause loss to

another," and the evidence is insufficient, in that probable cause has not been established, to sustain extradition on charges of false accounting with intent to cause loss to another under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

"b. For count seven in the Warrant of Arrest, the evidence before this Court established probable cause that defendant Oen committed the crime defined in Section 21(1) of the Hong Kong Theft Ordinance of Publishing a False Statement, and the evidence is sufficient, in that probable cause has been established, to sustain extradition on that charge under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong."

DATED: Nov. 12, 1987

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District
Judge
for the Northern District of
California

APPENDIX N

[Filed Nov. 13, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OEN YIN-CHOY,
Petitioner,

v.

GLEN E. ROBINSON,
United States Marshal
for the Northern
District of California,
Respondent.

Civil No.:
C 87-4705-RHS

ORDER

On November 6, 1987, a hearing was held in this Court on a petition for a Writ of Habeas Corpus filed by Petitioner Oen on September 10, 1987. This petition had been filed as a result of a Certification of Extraditability issued by this Court on September 4, 1987, in *In The Matter of The Extradition of OEN YIN-CHOY*, CR 87-0082-MISC-RHS, in which this Court had issued a Certification of Extraditability based on a request for extradition by the Crown Colony of Hong Kong.

During the course of the hearing on the petition for habeas corpus, this Court remanded to the extradition court one issue raised in the petition regarding the charges to which the Court should find extraditability proper. Since this same Court heard the initial request for extradition, this Court amended the initial Certification of Extraditability, as specified in the Amendment to Certification of Extraditability issued November 12, 1987 in CR 87-0082-MISC-RHS.

Based on all the papers filed by the parties to this proceeding, as well as the oral arguments made at the hearing on November 6, 1987;

IT IS HEREBY ORDERED that OEN YIN-CHOY's petition for a Writ of Habeas Corpus is hereby dismissed.

DATED: Nov. 13, 1987

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

APPENDIX O

[Filed December 7, 1988]

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OEN YIN-CHOY, Petitioner-Appellant, v. GLEN S. ROBINSON, U.S. Marshal for the Northern District of California, Respondent-Appellee.	No. 87-15055 [D.C. # CV-87-4705-RHS (Northern District of California) ORDER

Before: TANG, SCHROEDER, and NELSON, Circuit Judges.

The petitioner's motion to file the addendum to the petition for rehearing is granted.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The stay previously entered is vacated.

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 12, 1988]

OEN YIN-CHOY,
Petitioner-Appellant,
vs.
GLEN S. ROBINSON,
U.S. Marshal
for the Northern
District of California,
Respondent-Appellee.

No. 87-15055
DC# CV 87-4705-RHS
Northern California
ORDER

Before: TANG and SCHROEDER, Circuit Judges

The appellant's motion for stay of extradition pending the filing and resolution of a petition for a writ of certiorari is granted.

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 28, 1988]

OEN YIN-CHOY,
Petitioner-Appellant,
vs.
GLEN S. ROBINSON,
U.S. Marshal
for the Northern
District of California,
Respondent-Appellee.

No. 87-15055
DC# CV 87-4705-RHS
Northern California
ORDER

Before: SCHROEDER, Circuit Judge

The appellant's motion for a clarification of the orders of December 7, 1988, and December 12, 1988, is granted.

This court's order of December 7, 1988, which granted the appellant's motion to file an Addendum to the petition for rehearing, also served to permit the filing of the appellant's Supplemental Addendum to the petition for rehearing.

This court's order of December 12, 1988, served to stay the mandate in accordance with the provisions of Fed. R. App. P. 41(b).

APPENDIX R

[Filed July 17, 1987]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF OEN YIN-CHOY	No. CR-87-82-MISC-RHS DECLARATION OF ELLEN LAI-SHAN YEUNG IN SUPPORT OF OEN'S MOTION FOR CANTONESE ORIGINALS OF GOVERNMENT AFFIRMATIONS Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

I, ELLEN LAI-SHAN YEUNG, declare as follows:

QUALIFICATIONS

1. I was born in Hong Kong and my primary language is Cantonese Chinese. I am also fluent in English and Mandarin Chinese.

2. I received my Master of Arts in Chinese language and literature from San Francisco State University in 1981, where I was the recipient of the School of Humanties' Graduate Student Award. I am completing a Doctorate in Chinese Literature in the

Department of Asian Languages and Literature of Stanford University, Stanford, California (estimated date of completion summer 1989). I received my Bachelor of Arts from San Francisco State University, where I majored in English and minored in Chinese. I have a California secondary school teaching credential in English and Chinese and a California Community College teaching credential in Chinese.

3. My translation experience includes translating scripts for Cantonese simulcasts of television programs and video projects and translating position papers on Chinatown Rezoning for the San Francisco City Planning Department. I have also served as an expert witness in Chinese language translation in a civil case concerning a fraudulent will, and was retained as an expert consultant by the San Mateo County District Attorney's Office in relation to the criminal trial concerning the murder of Henry Liu.

4. I have taught Chinese language at the graduate level at Stanford University, Stanford, California since 1984. Prior to 1984, I taught advanced Chinese language and Chinese literature at the undergraduate and graduate levels at San Francisco State University from 1981-1983. I have also taught English as a Second Language and Conversational Mandarin Chinese in the San Francisco Community College District from 1980 to the present. From September 1977 to July 1980, I developed a set of curricula for teaching English as a Second Language to adults as the result of a project sponsored by the California State Department of Education and the Chinatown Resources Development Center.

5. I have translated numerous long pieces both from English to Chinese and from Chinese to English. A partial list of my published translations is included on my curriculum vitae, which is attached as Exhibit A to this declaration.

PROBLEMS IN CANTONESE/ENGLISH TRANSLATION

6. Based on my education and my experience as a translator from Cantonese to English and from English to Cantonese, I can state that it is often difficult to express the same ideas precisely

when translating from one of these languages to the other. A serious potential for ambiguity and inaccuracy always exists, relating in part to the translator's qualifications and expertise, and in part to his or her cultural background, personal experiences and potential biases.

7. Some Chinese concepts are absent in English and vice versa, causing native speakers of the two languages to conceptualize ideas somewhat differently. A good translator will try to convey a "foreign" concept with one that he himself considers to be an equivalent in his native culture; however, the resultant translation may be clumsy or may sacrifice some precision of meaning. Further, in such situations, two different translators may easily arrive at two different shades of meaning in translating the same concept. The translator's subjectivity and discretion always create a serious potential for error, especially in translation between languages as different as Chinese and English.

8. A concept or expression in one language may sound alien to a listener who speaks the second language because the two languages' structure and grammar differ. For example, the Chinese often use strings of adjectives to convey emphasis or nuance. If translated literally into English, these strings of adjectives would sound strange and repetitive. Although the adjectives mean something similar to each other, they do not always mean the same thing. In translating this sort of sentence into English, a translator will often try to eliminate the redundancy. Thus, she must choose the single English adjective that best approximates the sense of the long adjectival compound, although such an arbitrary choice is necessarily subjective and approximate.

9. Chinese and English word order often differs. Word order frequently conveys crucial information about what part of the sentence is most important to the speaker. This is especially true in Chinese where the object can be placed at the beginning of the sentence for emphasis. Further, another Chinese linguistic device allows the speaker to stress the time, place or manner of a verb, rather than its action. In making an idiomatic English translation, the translator may lose these subtleties of emphasis.

10. A related translation problem is the optional use of conjunctions in Chinese. For instance, the simple Chinese sentence "ta bu qu, wo ye bu qu" (literally, "he not go, I also not go") can be interpreted in three ways because of the absence of a conjunction: (a) "Neither he nor I will go;" (b) "If he won't go, then I won't go either; or (c) "Since he is not going, then I won't go either." The translator will base her decision on how she perceives the context, which necessarily varies between translators and always provides the potential for inaccuracy.

11. The Chinese language, unlike English, is a non-inflected language. Thus, there are few tenses in Chinese and no cases or number associated with the verb. So "I", "me," and "mine" may all be translated by the same word in Chinese. Likewise, the Chinese forms for such English verbs as "instructed," "had instructed," "used to instruct," "instruct," "am instructing," and "will instruct," may be identical. This creates a significant potential for ambiguity in translation. In addition, the inflected quality of English may force a translator to specify a verb form or tense where the Chinese speaker did not. The resultant choice may misrepresent the Chinese speaker's intended meaning.

12. Similarly, because Chinese is uninflected, Chinese nouns frequently do not differentiate singular and plural. Thus, the same Chinese word could be translated as "loan," "the loan," "a loan," "loans," "the loans," or "some loans." The translator must choose only one of these options, based on her preception of the context.

13. Pronouns are used sparingly in idiomatic Chinese. Thus, a Chinese speaker may express a series of actions without specifying the identity of the actor or the person acted upon. As a result, in an account of a conversation, it may be difficult to discern who is said to be speaking and to whom. An apparent example of this phenomenon occurs in the Affirmation of Lee Yue-wing at ¶ 31, Volume 3 at page 447:

> From the commencement of the acceptance of off-shore fixed deposits, staff of the accounts department amongst whom was a TAM Yuk-tsim, in November each year would at weekly meetings with branches instruct them not to say

anything to Coopers and Lybrand, the auditors regarding off-shore fixed deposits. [sic]

In this example, it is unclear whether Tam Yuk-tsim is giving the instructions, or whether someone else on the accounts department staff is giving these instructions, or whether someone else is giving instructions *to* the accounts department staff. The same affirmation, ¶ 39, Volume 3 at page 451 states: "I was instructed by OEN Yin-Choy to take charge of the current accounts of C.V. NASA and PTUCC, and as I have stated instructed that all off-shore deposits received by branches were to be deposited into these two accounts." Again, the identity of the person who gave instructions about the off-shore deposits is unclear. Generally, when translating such a sentence into English, a good translator is bound by English grammatical forms to put in a subject and an object. However, this gives the translator a great deal of influence over the meaning and creates a potential for serious inaccuracies.

SPECIAL DIFFICULTIES IN ORAL TRANSLATION

14. Mistakes of translation naturally increase during oral translation. The quicker the translator's response time, the more potential there is for error. A translator who is expected to translate on the spot without time for reflection is more likely to make mistakes, since there is no time to reflect on the accuracy of the translation. In my experience, the potential for inconsistencies within the translation greatly increases under such conditions. For example, inconsistent English terms may be used to translate the same Chinese word or a variety of nuances in Chinese may be rendered into a single English word or phrase. Thus, the exact circumstances and the degree of stress under which a translator works may seriously affect the accuracy of the translation.

15. Furthermore, because of an historical divergence between the written and spoken language, some Cantonese words cannot be written down. This phenomenon presents special problems to any translator trying to reconstruct or review a witness's oral statement from written Cantonese notes.

TRANSLATION PROBLEMS IN THE AFFIRMATIONS PROVIDED BY THE HONG KONG GOVERNMENT

16. I have reviewed some of the affirmations of Cantonese speakers offered in English in this case. Since I do not have access to the witness's testimony in Cantonese, I am unable to comment on the overall accuracy of the translations or how accurately specific sentences in English convey the intended meaning of the Cantonese-speaking witnesses.

17. However, the English translations provided contain many examples of errors commonly made in translating from Cantonese to English. For example, the Affirmation of Yeung Yun-tong states, at ¶ 2, Volume 4 at page 972: "During the periods that Oen Yin-choy as he was not in Hong Kong [sic], no one called for board [sic] of Directors' Meetings." This sentence contains a literal translation of a common Cantonese grammatical construction, resulting in a garbled English sentence. This also appears to be the case in the Affirmation of Lee Yue-wing at ¶ 19, Volume 3, page 442: "However, I can remember no specific instance when I saw Paul Li on telex instructions [sic] in respect of the loans made to Indonesian customers from July 1984." This evidence suggests to me that the testimony was originally given orally in Cantonese. Other sentences simply contain grammatical or syntactical errors, some of which result in ambiguity, such as: "In general terms I did not receive any instructions from Oen about the Indonesian loans because I do not speak much English and would have trouble with the name [sic]." (Affirmation of Lee Yue-wing, ¶ 14, Volume 3 at page 439.)

18. The quality of the English translation varies greatly. Some passages are rendered in smooth, idiomatic English, while others are plagued with obvious errors in basic English grammar and syntax. Further, the grammatical and syntactical mistakes are not consistent throughout. This suggests more than one "translator" was involved in drafting these affidavits. It appears that the original Cantonese to English translation was done hastily and/or by someone whose command of English was only fair. The English documents then appear to have been revised by a second person more fluent in English, possibly without reference to the

original Cantonese tapes, if any. Obviously, such a method would tend to further distort the original testimony.

19. My review of the affidavits and the mistakes noted above lead me to conclude that at least one of the translators of these affirmations is not competently fluent in English and that there may be more serious inaccuracies in these translations as a result. Such inaccuracies could only be revealed by a close comparison between the witnesses' affirmations as rendered in English and their original testimony in Cantonese or the translator's Cantonese version of the testimony.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on July 16, 1987.

/s/ ELLEN LAI-SHAN YEUNG
Ellen Lai-shan Yeung

EXHIBIT A

CURRICULUM VITAE

NAME: Ellen Lai-shan Yeung
ADDRESS:
TELEPHONE:

EDUCATION BACKGROUND

Doctor of Philosophy..... (in progress)	Stanford University Major: Chinese Literature
Master of Arts ..... (1981)	San Francisco State University Major: Chinese Language & Literature (recipient of Graduate Student Award, School of Humanities)
Bachelor of Arts ..... (1975)	San Francisco State University Major: English, Minor: Chinese
Credentials	Calif. Community College Instructor Subject: Chinese Calif. Secondary School Teacher Subjects: English & Chinese

TEACHING EXPERIENCE

Stanford University 1984-present	advanced Chinese language (reading & writing)
San Francisco State..... 1981-1983	advanced Chinese language, undergrad & grad Chinese literature
S.F. Community College District 1980-present	ESL, citizenship and conversational Mandarin
S.F. Unified School..... 1976-1977	English and social science

CURRICULUM DEVELOPMENT

Sept. 77-July 80.....	Developed three semesters of prevocational ESL curriculum for new adult immigrants. This three-year project was funded by the State Department of Education and sponsored by the Chinatown Resources Development Center. (See also Publications section)

Summer 74..... Developed an intermediate-level reader for junior high students as a project for an EPDA Chinese Bilingual Ed workshop sponsored by San Francisco State University. This reader has been used in Marina and Benjamin Jr. High.

TRANSLATION EXPERIENCE

1. Translated scripts for Cantonese simulcasts of television programs and video projects

2. Translated position papers on Chinatown Rezoning for the S.F. City Planning Department

3. Acted as Chinese language expert in civil and criminal cases, checking for accuracy of translations used in court testimony

RELEVANT VOLUNTEER ACTIVITIES

1. Was newscaster and coordinator of a one-hour bilingual radio program ("Chinese Community Hour") on KQED-FM from 1970-1984

2. Was interpreter and mistress-of-ceremony at lectures, workshops and community events sponsored by the Chinese Culture Center of San Francisco from 1980-1986

3. Was editor of the bilingual membership letter for the Chinese Culture Center during 1983

PUBLICATIONS

Language Curriculum

1. *English That Works*, Scott Foresman & Co.: Glenview, Illinois, 1982 (co-authors: L. Savage & M. How, referred to in the Curriculum Development section)

Translations

English to Chinese:

1. *Qianjin (Thousand Pieces of Gold)*, by Ruthanne L. McCunn, *East-West:* San Francisco, California, 1983

2. *Pie-biter*, by Ruthanne L. McCunn, Design Enterprises: San Francisco, Calif., 1983

Chinese to English:

1. "The Field of Life and Death" by Xiao Hong, in *The Field of Life and Death and Tales of Hulan River*, Indiana University Press: Bloomington, Indiana, 1979 (co-translator: Howard Goldblatt)

2. "Dawn on the River" by Jun Qing, in *Literature of the People's Republic of China*, ed. by Kai-yu Hsu, Indiana University Press: Bloomington, Indiana, 1980

3. "Opening Address to the Third Congress of the Chinese Writers Association" by Liu Baiyu, in *Chinese Literature for the 1980s (The Fourth Congress of Writers & Artists)*, ed. by Howard Goldblatt, M.E. Sharpe Inc.: Armonk, N.Y., 1982

4. "A Bundle of Letters" by Bai Hua, in *Stubborn Weeds—Popular & Controversial Chinese Literature After the Cultural Revolution*, ed. by Perry Link, Indiana U. Press: Bloomington, Indiana, 1983

5. *The Butcher's Wife* by Li Ang, Northpoint Press: San Francisco, California, 1986 (co-author: H. Goldblatt)

6. "The Way of the Beast" by Sha Ding, in *Furrows*, ed. by Helen Siu, Stanford University Press: Stanford, Calif., forthcoming

APPENDIX S

[Filed August 17, 1987]

CEDRIC C. CHAO
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Attorneys for Defendant
OEN YIN-CHOY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF	No. CR-87-82-MISC-RHS SECOND AFFIDAVIT OF DAVID WILLIAM MACE
OEN YIN-CHOY	Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

To all to whom these presents shall come:

I, Hon-Che Yeung Notary Public, duly authorised and sworn, residing and practising in Hong Kong

Do hereby certify that on the 3rd day of August 1987 at Suite 934-936, Swire House, No. 11 Chater Road, Hong Kong before me the Affidavit of Mr. David William Mace annexed hereto was duly executed by Mr. David William Mace and that the name subscribed thereto is of the proper hand writing of the said Mr. David William Mace.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this 3rd day of August One thousand nine hundred and eighty-seven.

/s/ Hon-Che Yeung
Notary Public, Hong Kong.

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF:	Criminal No.: CR 87-82-MISC-RHS
OEN YIN-CHOY	AFFIDAVIT OF DAVID WILLIAM MACE

I, David William Mace of 26th Floor, Great Eagle Centre, 23 Harbour Road, Hong Kong, Chartered Accountant make oath and say as follows:—

1. I am a Fellow of the New Zealand Society of Accountants, having qualified as a chartered accountant in New Zealand in 1964. I am also a Fellow of the Hong Kong Society of Accountants, and a Fellow of the Institute of Chartered Secretaries.

2. I am a partner in the firm of Arthur Young, Certified Public Accountants, of 25-27 Floors, Great Eagle Centre, 23 Harbour Road, Wanchai, Hong Kong. Arthur Young has gained an international reputation in the field of public accountancy and audit, with experience in all aspects of commercial activity. I first came to work for Arthur Young in Hong Kong in October 1983 on a secondment basis when, as a senior insolvency partner of the New Zealand practice, I was asked to assist in the conduct of a major liquidation assignment in Hong Kong. Subsequently I joined the Hong Kong office of Arthur Young on a permanent basis on 1 April 1985.

3. Since I became a qualified accountant in 1964, I have gained experience in the operations and methods of a wide variety of local and international organisations.

4. I am now a partner in Arthur Young in its corporate services department, being mainly responsible for investigation, insolvency and liquidation work.

5. I have read and examined the 14 volumes of documents ("the record") produced by the Hong Kong Government in support of the request for the extradition of OEN Yin Choy from the United States of America to Hong Kong allegedly in respect

of 6 offences contrary to Section 19(1)(a) of the Theft Ordinance Cap.210 of the Laws of Hong Kong, and an offence contrary to Section 21(1) of the said Theft Ordinance. In particular I have read and examined the affirmation of one John Michael Henley Grimsdick ("the Grimsdick Affirmation") and the attached document entitled "Union Bank Investigation Report on Certain Indonesian Loans granted by Union Bank in 1984" ("the Accountants' Report").

6. In expressing the conclusions to which I depose below in paragraphs 8 and 9, I am relying and commenting on the record and have not examined any other evidence. I do not express any view on the substance of the transactions as any such view would require a complete analysis of all the documents underlying them, many of which are not in the record and have not been available to me at this time.

7. The Grimsdick Affirmation and the Accountants' Report both describe an investigation conducted by the accounting firm of Ernst & Whinney regarding six loans made by Union Bank in 1984. The Grimsdick Affirmation and the Accountants' Report conclude that these six loans were falsely recorded and falsely accounted for. These conclusions were inferred by Mr. Grimsdick principally from his "findings" that the funds were not directly disbursed to the recorded borrowers, that such funds were disbursed to other parties, and that such disbursement was "unnecessarily complex". He opined that if Union Bank had actually intended to make payments to the recorded borrowers then a more direct method of payment would have been used. (Accountants' Report Vol.2 at 384-385)

8. In my experience, there are numerous legitimate commercial loans in which the proceeds are not paid directly to the borrower. Accordingly, it simply does not follow that a loan is false because the proceeds are not directly received by the borrower. Also, it is not unusual to have complex disbursement patterns, and it is unreasonable to conclude that a loan is false because of such complex disbursement patterns. Lastly, to say that were the loans not false a more direct payment method would have been used simply does not follow, since indirect and complex payment methods are not unusual.

9. In fact, the record demonstrates that all of the borrowers with whom Mr. Newman talked acknowledged the loans and indicated their desire to repay or renegotiate the loans. For example, when Mr. Newman (Affidavit of Jonathan Peter Newman Vol. 4 at 1092-93) states that he met Mr. Susanto, a representative of P.T. Sinar Tangerang Steel and the spokesman for the loan account in the name of his wife, Mrs. Hariani Ngadamin, Mr. Susanto "expressed the desire to repay the bank, but that he was unable to do so at present" (Vol.4 at 1092). Mr. Susanto was prepared to sell assets to repay the Bank (Vol.4 at 1093).

Similarly, when Mr. Newman met Mr. Sutato Muyono, a General Manager representing the owner of P.T. United Roxy Crown, the latter acknowledged the loan by asking for "three years more to pay" the bank (Vol.4 at 1094). When Mr. Newman met Mr. Salim, a representative of F.A. Gaya Setia Baru, the two discussed "the possibility of renegotiating the loan outstandings . . ." (Vol.4 at 1095).

Clearly, the foregoing discussions are not the responses of persons who are not the borrowers. In the light of them, Mr. Grimsdick's conclusions summarized at paragraph 7 above, lack a proper commercial (or logical) basis.

SWORN at 936, Swire House
Chater Road, Central, Hong Kong /s/ D.W. MACE
this 3rd day of August 1987

Before me,

/s/ HON-CHE YEUNG
Hon-Che Yeung
Notary Public
Hong Kong

APPENDIX T

[Filed July 18, 1987]

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Attorneys for Defendant
OEN YIN-CHOY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

	No. CR-87-82-MISC-RHS
IN THE MATTER OF THE EXTRADITION OF	DECLARATION OF PROFESSOR HUNGDAH CHIU IN OPPOSITION TO EXTRADITION REQUEST
OEN YIN-CHOY	Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

I, PROFESSOR HUNGDAH CHIU, declare as follows:

QUALIFICATIONS

1. I am a Professor of Law at the University of Maryland School of Law, a position I have held since 1977. At the University of Maryland School of Law, I teach or have taught courses or seminars on the following subjects: Legal Developments of Mainland China (this course had been renamed "Chinese Law"); Soviet, Chinese and Western Approaches to International Law; Public International Law; International Trade Law; and International Transactions. I have been in charge of the East Asian Legal Studies Program of the University of Maryland School of Law since 1977. Previously (1966-1970), I participated in teaching Chinese Attitudes Toward International Law, as well

as Soviet, Chinese and Western Approaches to International Law at Harvard Law School. In 1980, I taught a course on Government and Politics of China at the University of Virginia.

2. I was born in Shanghai, China in 1936. I was educated in schools in Mainland China and Taiwan. In 1958, I graduated from National Taiwan University with an LL.B. degree. In 1960, I moved to the United States and continued my legal studies in this country. In 1962, I graduated from Harvard Law School with an LL.M. degree, and in 1965 I was awarded the S.J.D. (Doctor of Juridical Science) degree from Harvard Law School. Between 1965 and 1974, I held various teaching and research positions at Harvard, at the National Taiwan University and National Chengchi University. Since 1974, I have been on the faculty at the University of Maryland School of Law. In the summer of 1979 I was a Fellow at the Institute for Sino-Soviet Studies at George Washington University in Washington, D.C., and in the fall of 1980 I was a part-time Visiting Professor of Government and Foreign Affairs at the University of Virginia, teaching a course on the Government and Politics of China there.

3. I am a member of numerous professional associations and scholarly organizations, including the American Association for Chinese Studies, of which I am presently the president and a member of the board of directors; the American Society of International Law, of which I served as a member of the panel on China and International Order between 1969 and 1973; the Association for Asian Studies, of which I was a member of the Committee on Asian Law between 1976 and 1979; the International Law Association, of which I served as an observer to the Third United Nations Conference on the Law of the Sea between 1976 and 1982; and the British Institute of International and Comparative Law.

4. I have written, edited, and contributed to numerous scholarly publications relating to International Law, Chinese politics and legal systems, and the Hong Kong question. My works in English concerning China's legal system, constitution and politics, and the Hong Kong issue, include the following:

Articles

(a) "The Judicial System Under the New PRC Constitution," in *The New Constitution of Communist China: Comparative Analyses,* Taipei: Institute of International Relations, 1976, pp. 63-121.

(b) "Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents," 68 *Journal of Criminal Law & Criminology* 374-398 (1977).

(c) "Certain Problems in Recent Law Reform in the People's Republic of China," in 3 *Comparative Law Yearbook, 1979* at 1-33 (Leyden: A.W. Sijthoff, 1980).

(d) "China's New Legal System," 79 *Current History*, No. 458, at 29-32, 44 (September 1980).

(e) "Structural Changes in the Organization and Operation of China's Criminal Justice System," 7 *Review of Socialist Law*, 53-72 (1981).

(f) "Socialist Legalism: Reform and Continuity in Post-Mao People's Republic of China," *Mainland China's Modernization: Its Prospects and Problems*, published by the Institute of International Studies, and Institute of East Asian Studies, University of California at Berkeley (1981), pp. 62-92. (A slightly revised version also published in 17 *Issues & Studies*, No. 11 (Nov. 1981), pp. 47-75, and *Occasional Papers/Reprint Series in Contemporary Asian Studies*, No. 1-1982 (46)).

(g) "Chinese Law and Justice: Trends Over Three Decades," University of Maryland School of Law, *Occasional Papers/Reprint Series in Contemporary Asian Studies*, No. 7-1982 (52), 34 pp.

(h) "The Chinese Constitution and the Rule of Law," 11 *Review of Socialist Law*, No. 2, at 143-160 (1985).

(i) "China's Legal Reforms," 84 *Current History*, No. 503, at 268-271, 275-276 (September 1985).

(j) "The 1984 Sino-British Settlement on Hong Kong: Problems and Analysis," 2 *Journal of Chinese Studies*, No. 3, at 95-111 (April 1985).

(k) "The 1984 Sino-British Agreement on Hong Kong and Its Implication on China's Unification," 21 *Issues & Studies*, No. 4, at 13-22 (April 1985).

Books

(l) Co-Author, *People's China and International Law: A Documentary Study*, 2 Volumes (with J.A. Cohen, Harvard Law School), Princeton, New Jersey: Princeton University Press, 1974, 1790 pp. (Awarded a Certificate of Merit by the American Society of International Law in 1976.)

(m) Co-author, *Criminal Justice in Post-Mao China*, Albany, N.Y.: State University of New York Press, 1985, 300 pp.

(n) Co-editor and contributor, *China: 70 Years After the 1911 Hsin-hai Revolution*, Charlottesville, Virginia: University press of Virginia 1984, 601 pp.

(o) Editor and contributor, *Symposium on Hong Kong; 1997*, Occasional papers/Reprints Series in Contemporary Asian Studies, 1985-3 (68). 99 pp. Index.

(p) Co-editor and contributor, *The Future of Hong Kong: Toward 1997 and Beyond*, New York, Westport (Conn.) and London: Quorum Books, The Greenwood Press, June 1987. 262 pp. Index.

5. Chinese is my native language, and I can read, write, and speak Mandarin Chinese fluently. I am also fully fluent in the English language. I maintain a library of Chinese language political and legal publications from the People's Republic of China which I use in my scholarly and professional endeavors.

6. I am familiar with the People's Republic of China's legal system, constitution and politics, including the status of individuals under the PRC regime. On October 10, 1985, I was invited by the Subcommittee on Human Rights and International Organiza-

tions and the Subcommittee on Asian and Pacific Affairs of the U.S. House of Representatives to testify at the Hearing on Human Rights and Political Developments in the People's Republic of China.

THE STATUS OF HONG KONG

7. Britain established control over Hong Kong in three stages: (1) China ceded the island of Hong Kong to Britain "in perpetuity" after being defeated in the 1839-42 "Opium War." Treaty of Nanking, August 29, 1842, United Kingdom-China, 93 *Consolidated Treaty Series*, at 467, art. 3. (2) China further ceded an approximately 3½ square mile area at the southern tip of the Kowloon Peninsula to Britain in perpetuity after being defeated in the 1850-60 "Arrow War." Convention of Friendship between China and Great Britain, October 24, 1860, 123 *Consolidated Treaty Series*, at 73-74, art. 6. (3) In 1898, China was compelled to lease to Britain an additional 365 square miles, including the rest of the Kowloon Peninsula. Convention between China and Great Britain respecting an Extension of Hong Kong Territory, June 9, 1898, 186 *Consolidated Treaty Series*, at 310-311. This territory, referred to as the "New Territories," includes the greater part of the territory administered by Hong Kong's colonial government.

8. Since the establishment of the People's Republic of China (the "PRC") in 1949, China has consistently maintained that these 19th century treaties were "unequal" instruments, obtained by force, and hence illegal, null and void. Consequently, China has insisted that it, and not Britain, possesses sovereignty over Hong Kong. Britain has insisted, however, that the treaties are valid and that Hong Kong Island and the Kowloon Peninsula are legally British territory.

9. China's position, that it maintains full sovereign rights over all of Hong Kong and that Britain's presence is temporary and illegal, has been consistent and public. On March 10, 1972, China sent a letter to the United Nations General Assembly's Special Committee on Colonialism, demanding that the Committee drop Hong Kong from its list of colonies subject to international

oversight on the ground that "Hong Kong . . . [is] part of Chinese territory occupied by the British . . . authorities. The settlement of the question of Hong Kong . . . is entirely within China's sovereign right and does not fall at all under the ordinary category of colonial territories." "China Makes Claim in UN to Hong Kong, Macao," *International Herald Tribune* (Paris), March 11-12, 1972, p. 1; *reprinted in* J.A. Cohen and H. Chiu, 1 *People's China and International Law: A Documentary Study*, 384 (1974). (*See* Exh. 1, appended hereto) A September 26, 1983 article in *Beijing Review*, a publication generally regarded by scholars as reflective of official PRC policy, stated that

> [a]ll the three treaties were the product of unlawful acts; they were all concluded by Britain's use or threat of force; their contents constitute serious encrouchments upon China's sovereignty and territorial integrity and violations of the peremptory norms of international law. Therefore . . . these treaties should be considered null and void.

Jin Fu, "China's Recovery of Xianggang (Hong Kong) Area Fully Accords With International Law," 26 *Beijing Review*, No. 39 (September 26, 1983), p. 16. (Exh. 2 hereto)

10. Beginning in 1982, Britain and China therefore began negotiations over the return of Hong Kong to China in 1997. These negotiations produced, in 1984, a Sino-British "Joint Declaration . . . on the Question of Hong Kong." Instruments of ratification were duly exchanged on May 27, 1985. *Facts on File, 1985*, vol. 45, No. 2323 (May 31, 1985) p. 412. (*Facts on File*, p. 412, and the text of the Joint Declaration are appended as Exh. 3 hereto.)

11. The Joint Declaration provides that control over Hong Kong will pass from Britain to China on July 1, 1997. Under the terms of the Joint Declaration, Hong Kong's economic system and lifestyle are to remain unchanged for 50 years after 1997. Individual rights will, the document promises, be respected by the post-1997 Hong Kong government, which is to "enjoy a high degree of autonomy" from PRC authorities, except in foreign and defense affairs. Joint Declaration, Para. 3(2).

12. The Joint Declaration does not, however, resolve the issue of sovereignty over pre-1997 Hong Kong. Rather, it finesses the issue. Paragraph 1 provides that the PRC "has decided to *resume the exercise of sovereignty* over Hong Kong with effect from 1 July 1997." (emphasis added.) This wording is consistent with China's view that it never lost *sovereignty* over the territory, but merely the ability to exercise what already existed. Thus, the Joint Declaration does not contradict China's persistent assertion that Hong Kong is, was, and will be Chinese territory, over which China may, at such time as it sees fit, reassert pre-existing sovereign rights.

UNCERTAINTIES REGARDING THE CRIMINAL JUSTICE SYSTEM AS A RESULT OF THE 1997 TRANSITION

13. The Sino-British Joint Declaration sets out a general framework for the transition from British to Chinese administration of Hong Kong, but it provides few specifics. This is of particular concern in the criminal justice area because China and Britain have such different concepts and procedures governing state treatment of accused and incarcerated criminals.

14. The Joint Declaration provides that China will embody and expand the Declaration's basic policies in a Basic Law, which is currently being drafted. A first draft of the Basic Law will not be issued until 1988, and passage by China's National People's Congress is not expected until 1990. Thus, there is at present no way to be certain what legal provisions will govern Hong Kong prisoners who pass into China's control in 1997. Preliminary indications suggest that the committee drafting the Basic Law will not address this issue. See "Structure of Hong Kong Basic Law," *reprinted in The Future of Hong Kong: Toward 1997 and Beyond*, at 237-241, H. Chiu, Y.C. Jao and Y.L. Wu, eds. (1987) (Exh. 4 hereto) (adopted by the Second Session of the Basic Law Drafting Committee in Beijing, on April 22, 1986). On April 16, 1987, Chinese leader Deng Xiaoping told members of the Basic Law Drafting Committee: "[T]he Basic Law of the Hong Kong Special Administrative Region should not be written in great detail. I am afraid that the Hong Kong system should not

completely copy Western systems." "Deng Xiaoping Discusses 'One Country, Two Systems'," *Foreign Broadcast Information Service, China*, April 17, 1987, p. W3 (Exh. 5 hereto). In view of this statement, it seems unlikely that the Basic Law will deal with the prisoners question. If it does not, then China will be free to decide what to do with Hong Kong prisoners sentenced before 1997 when China "resumes" its exercise of sovereignty in Hong Kong.

15. Even if the prisoners question is dealt with in the Basic Law, relegation of this issue to the Basic Law instead of the Sino-British Declaration could have important consequences for Hong Kong prisoners who pass into China's control in 1997. The Joint Declaration is an international obligation between China and Britain. Any violation of its terms could result in diplomatic protest or other action by the British government. The Basic Law, in contrast, will simply be a statute passed by China's National People's Congress. According to Article 67, paragraph 4 of the PRC Constitution, the Standing Committee of the National People's Congress is empowered to interpret and amend statutes. (Exh. 6 hereto) Amendment or interpretation of the Basic Law in a subject area as to which the Joint Declaration is silent would give Britain almost no grounds to protest or intervene.

16. A third possible avenue for settling the prisoners issue might be in the Sino-British Joint Liaison Group, which will be charged with considering "procedures . . . for the smooth transition in 1997." Joint Declaration, Annex II, para. 5. (Exh. 3 hereto) Whether the Joint Liaison Group will in fact work out an arrangement on prisoners is, however, a question which cannot be definitively answered now.

17. In addition, the rights and freedoms promised in the Joint Declaration, even if fully set forth in a future Basic Law of Hong Kong, are subject to Chinese interpretation. If Britain were to disagree with China's interpretation, it could raise objections only through negotiation or other modes of peaceful settlement agreeable to the Chinese. This is because the Joint Declaration contains no mechanism for arbitration or judicial settlement. The PRC is well-known to disfavor third party adjudication in the settlement of its international disputes. *See* Liu Fengming,

Xiandai Guojifa Gangyao (Outline of Modern International Law) at 159-160 (1982). (Exh. 7 hereto) For example, China has neither submitted to adjudication before the International Court of Justice nor accepted the compulsory jurisdiction of that court.

18. Although the Joint Declaration promises autonomy, certain provisions of China's constitution suggest that such autonomy may be quite limited. Local laws may be amended by the Standing Committee of the National People's Congress, under its Article 67, paragraph 4 power "to interpret statutes," if they are found to conflict with the laws of the central government. (Exh. 6) Paragraph 8 of the same article says that the Standing Committee has the power

> to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations . . . (Exh. 6 hereto)

Similarly, the State Council, according to Article 89, para. 14 of the Constitution, has the power "to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels." (Exh. 6 hereto) Moreover, on June 8, 1987, the Basic Law Drafting Committee reached a consensus that "any laws on defense and foreign affairs and those related to the realization of China's national unity and territorial integrity are not within the scope of the high degree of autonomy given to Hong Kong." The Drafting Committee has not yet defined the clause "realization of national unity and territorial integrity." "Basic Law Body Agrees on Application of PRC Laws," *Foreign Broadcast Information Service, China,* June 9, 1987, p. W2. (Exh. 8 hereto) Therefore, certain PRC laws will be applied to Hong Kong in the post-1997 period. At present, the PRC has not specified which laws these will be. Recent statements by Chinese leader Deng Xiaoping suggest that post-1997 Hong Kong's "high degree of autonomy" is subject to China's "benevolent intervention" if China decides that intervention would be in the best interest of Hong Kong people:

> Don't think everything will be just fine once all Hong Kong affairs are administered by the Hong Kong people, and the central authorities will have nothing to look after. Such an idea is unrealistic. It is true that the central authorities will not interfere in the special administrative region's specific work. The central authorities need not interfere. However, if in Hong Kong something to the detriment of the country's fundamental interest or harmful to Hong Kong's own fundamental interests happens, can Beijing then refrain from interfering? If the central authorities gave up all rights, chaos might occur, which would harm Hong Kong's interests. Therefore, to retain some powers of the central authorities will be beneficial rather than harmful in Hong Kong.

"Deng Xiaoping Discusses 'One Country, Two Systems'," *Foreign Broadcast Information Service, China,* April 17, 1987, p. W3 (Exh. 5 hereto).

THE QUESTION OF CHINESE JURISDICTION OVER CRIMES COMMITTED IN HONG KONG

19. After 1997, it will be undisputed that, as a matter of international law, the Chinese government may exercise jurisdiction over any offenses committed within its territory, including Hong Kong. Several sections of the Joint Declaration suggest that China will delegate this jurisdiction to local Hong Kong authorities. Part III of Annex 1 provides that the "judicial system previously practised in Hong Kong shall be maintained, except for those changes consequent upon the vesting in [Hong Kong] courts . . . of the power of final adjudication" and that a "prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference." (Exh. 3 hereto)

20. There is, however, no provision to exclude Chinese exercise of *criminal* jurisdiction in Hong Kong. Presumably, this question will be dealt with in the Basic Law. As explained above, however, the legal structure of the transition does not foreclose the possibility that China could reinterpret or revise the Basic Law. Thus, at present, there is no way to be certain that China

will not exercise its valid jurisdiction over criminal matters in Hong Kong.

21. Moreover, under Chinese law the PRC could assert jurisdiction over crimes which occurred before 1997. According to the PRC's consistently expressed position, Hong Kong has always been part of China's territory and subject to its sovereignty. *See* paragraph 9, *supra*. China did not renounce this position in the Joint Declaration. *See* paragraph 12, *supra*. Thus, according to Chinese legal principles, China now has jurisdiction over crimes committed in Hong Kong. The fact that China has not exercised this jurisdiction does not mean, any more than allowing Britain to administer the territory meant, that it will not assert its rights "at an appropriate time." *See* paragraph 12, *supra*.

22. An alternative basis for jurisdiction over pre-1997 criminals exists in statutes which apply Chinese law to actions outside China which affect the PRC or its citizens. Article 6 of the Chinese Criminal Law provides:

> [The Chinese Criminal Law] may be applicable to foreigners who, outside the territory of the People's Republic of China, commit crimes against the state of the People's Republic of China or against its citizens, provided that this Law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according to the law of the place where it was committed. (Exh. 9 hereto)

In addition, Article 3, paragraph 3 of the Criminal Law provides that "when either the act or consequences of a crime takes place within the territory of the People's Republic of China, a crime is to be deemed to have been committed within the territory of the People's Republic of China." (Exh. 9 hereto) Thus, even if the Basic Law, when drafted, provides for exclusion of Chinese criminal jurisdiction over crimes committed in Hong Kong, if China considers the crime to have affected Chinese territory other than Hong Kong, or Chinese citizens, China can still exercise jurisdiction over that crime.

THE POSSIBILITY FOR RETRIAL AND REMOVAL OF HONG KONG PRISONERS PASSING INTO CHINESE CONTROL IN 1997

23. Should China decide to exercise its criminal jurisdiction described in paragraphs 19-22 above, current PRC law and practice would allow both the retrial of criminal defendants who were tried in Hong Kong before 1997, and the relocation of Hong Kong prisoners to other parts of China.

24. Chinese criminal law and procedure would not inhibit retrial of an already convicted criminal under prevailing Chinese laws.

Article 148 of the Chinese Criminal Procedural Law, for example, allows any citizen to request the court to reopen a decided case for retrial.

> *Article 148.* Parties, victims and their family members or other citizens may present petitions regarding judgments or orders that have already become legally effective to the people's courts or the people's procuratorates, but the execution of such judgments or orders cannot be suspended. (Exh. 9)

Article 149 requires a decided case to be reopened if judicial officers find that the final decision contained errors in the "determination of facts or application of law." (Exh. 9 hereto)

25. The Chinese Criminal Procedure Law prescribes no time limit (such as within 5, 10 or more years) for reopening a decided case for retrial. According to a standard Chinese textbook, "since the establishment of the [People's Republic of China], the people's courts and the people's procuratorates had taken the initiative several times to make overall review or selected review of those judgments which had been entered into force [i.e., final judgments]." *Xingshi Susong Fa Jiaocheng* (Textbook of Criminal Procedure Law), (1982). (Exh. 10 hereto)

26. Popular dissatisfaction about a decided case may cause it to be reopened for a new trial. The following case reported in a Chinese law journal is illustrative:

October 1981	Yu Xiuzhong was sentenced to six years fixed-term imprisonment for committing the offenses of rape and hooligan activities by the Shanghai Intermediate People's Court.
March 1982	Yu was acquitted by the Shanghai Higher People's Court.
March-June 1982	Many people wrote to newspapers and government agencies in charge of political-legal affairs demanding to punish him.
June 1982	Yu was re-arrested by the Public Security Organ (Police).
August 21, 1982	Yu was resentenced to four years fixed-term imprisonment for committing the offense of rape.

(*See* "Maintaining the Dignity of the Socialist Legal System—[Shanghai] Higher People's Court Resentenced Yu Xiuzhong to Four-Year Fixed-Term Imprisonment," *Minzhu Yu Fazhi* (Democracy and Legal System), No. 9, 1982, p. 41. (Exh. 11 hereto)

27. Since 1985, China has published brief summaries of only a small number of court cases in the Gazette of the Supreme People's Court. Prior to 1985, no Court opinions were published officially. Thus, there is no way to know what type of offenses could in fact be retried. Presumably, all types of offenses could be retried.

28. Should China apply these provisions to retry a previously convicted criminal defendant, there is no constitutional prohibition against applying law retroactively. Thus, no legal barrier exists to the *ex post facto* application of PRC law and procedure to pre-1997 Hong Kong crimes.

29. There is also no legal rule barring the removal of Hong Kong prisoners to other parts of China after 1997. While this issue might be dealt with in the Basic Law, the exact provisions of

the Basic Law will not be known until 1990. At present, no law prevents Chinese authorities from moving prisoners around within China. Even if the Basic Law contains special provisions for Hong Kong, China will, as discussed above, have the constitutional authority to change the Basic Law at any time.

30. In sum, ambiguities and lack of specificity in the framework for Hong Kong's transition to Chinese control, and present PRC law, make it impossible to exclude the possibility that a person who is convicted before 1997 and is still imprisoned in Hong Kong after the PRC assumes control over Hong Kong, may be retried under Chinese law or may be sent out of Hong Kong to another location within the PRC for incarceration there.

THE CRIMINAL JUSTICE SYSTEM OF THE PRC

31. The substance and procedure of China's criminal justice system do not comport with Anglo-American notions of fairness and due process. *See generally* S.C. Leng and H. Chiu, *Criminal Justice in Post-Mao China*, State University of New York Press, 1985, pp. 85-122. (Exh. 12A hereto)

32. Judges and judicial officers in the PRC are not independent of political authorities in the sense that American jurisprudence defines judicial independence.

33. Although the 1982 PRC Constitution provides, in Article 126, that "[t]he people's courts exercise, in accordance with the provisions of the law, judicial authority independently and are not subject to interference by administrative organs, public organizations, and individuals," it does not preclude the Communist Party of China from interfering. As a matter of fact, the "judiciary is nominally independent but in practice follows party policy." *Country Reports on Human Rights Practices for 1986*, compiled by U.S. Department of State, February 1987, at 686. (Exh. 12B hereto)

34. One reason for judicial deference to the Communist Party is that judges do not have life tenure. Moreover, no legal training is required for serving as a judge. *See* Article 34 of the 1979 Organic Law of the People's Courts, in R.H. Folsom and

J.H. Minam, *Law in the People's Republic of China: Text, Readings and Materials* 117 (1986). (Exh. 13 hereto) Presidents of higher (provincial), intermediate (administrative region within a province or big city) and basic (county or city) courts are elected or recalled by the People's Congresses of corresponding level for five year terms. Vice-presidents and judges are elected or recalled by the Standing Committees of the People's Congress at the corresponding level for five year terms. *See* Articles 35 and 36 of Organic Law of People's Court. (Exh. 13) Since the Communist Party controls nominations and elections in all the People's Congresses, a judge who disregards the Party's policies runs the risk of being removed or not being nominated for reelection.

35. On paper, the 1979 Chinese Criminal Procedure Law makes a major step toward rule by law, rather than by decree. (See, e.g., Articles 4, 26, 50, 92, 110, 144 in Exh. 9 hereto) In practice, however, procedures are often ignored, and, in any event, Chinese court proceedings do not meet American standards of due process.

36. The 1979 Criminal Procedure Law does not include a fundamental maxim of Anglo-American criminal justice: the presumption of innocence of an accused until he is proved guilty. *Country Reports on Human Rights Practices for 1986,* compiled by U.S. Department of State, February 1987, at 686. (Exh. 12B hereto)

37. Moreover, although various procedural guarantees are provided, Chinese authorities may disregard them with impunity if they find it necessary. The attached excerpts from my testimony submitted to the Hearings on Political Developments and Human Rights in the People's Republic of China, held before the Subcommittee on Human Rights and International Organizations and the Subcommiittee on Asian and Pacific Affairs of the Committee on Foreign Affairs of the U.S. House of Representatives on October 10, 1985, illustrate this point. (*See* Exh. 14 hereto, especially pages 65-67, 71-72) A similar view was expressed in Amnesty International's testimony in the same hearings, submitted by Professor Andrew J. Nathan of Columbia University. (*See* Exh. 14 at 77-83)

38. Because of the differences in criminal procedure between the United States and Britain, on the one hand, and China, on the other hand, a person charged by Chinese authorities for violating Chinese law could be convicted even if, under similar circumstances, the person could not be convicted in the United States or Britain.

39. Persons sentenced to incarceration in PRC prisons serve their terms in institutions about which little information is available outside China. A 1984 Amnesty International report provided information indicating that Chinese prison conditions do not always comport with American standards:

> Although the ill-treatment of prisoners is prohibited by Chinese law, prisoners have been subjected to punishments which constitute ill-treatment according to international standards. Officials have acknowledged that there is a system of punishments—including solitary confinement—for prisoners who break prison rules. Prisoners are sometimes punished harshly just because they are considered "resistant" or because they complain about their treatment, according to former prisoners. This is particularly frequent during detention before trial when prisoners are held in isolation, usually for several months, and repeatedly interrogated, without being allowed to see their family, friends or a legal representative. Amnesty International believes that some of these punishments constitute cruel, inhuman and degrading treatment. They include the use of solitary confinement over the prolonged period; the use of hand shackles—sometimes with the hands tied behind the back—day and night for days or weeks; and other punishments such as beatings or being made to stand without moving for 24 hours without food. Such punishments are also used against convicted prisoners held in prisons or labour camps, although apparently more rarely than in detention centres.

Amnesty International, *China, Violations of Human Rights* 18 (1984). (Exh. 15 hereto)

THE IMPOSITION OF THE DEATH PENALTY IN CHINA FOR ECONOMIC CRIMES

40. The Chinese Criminal Law is drafted in very general terms. Several provisions refer to economic crimes, and, despite vague definitions, specify often harsh sentences. Two articles are listed below to illustrate this point:

> *Article 152.* Whoever . . . steals, swindles or forcibly seizes articles of public or private property of a huge amount is to be sentenced to not less than five years and not more than ten years of fixed-term imprisonment; when the circumstances are especially serious, the sentence is to be not less than ten years of fixed term imprisonment or life imprisonment, and the offender may in addition be sentenced to confiscation of property. (Emphasis added)
>
> *Article 167.* Whoever forges, alters or steals, forcibly seizes or destroys official documents, certificates or seals of state organs, enterprises, institutions or people's organizations is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprivation of rights; when the circumstances are serious, the sentence is to be not less than three years and not more than ten years of fixed term imprisonment.

(Exh. 9 hereto)

41. Economic crimes in China may be punished by death. On March 3, 1982, the Standing Committee of the National People's Congress amended the Chinese Criminal Law so that the death penalty could be imposed on a broader range of crimes, including economic crimes. For example, Article 152 of the Criminal Law was amended as follows:

> (1) With respect to . . . the crime of theft in Article 152 . . . [the] sentencing is . . . supplemented or revised as follows: when the circumstances are particularly serious, the sentence is to be not less than ten years of fixed-term imprisonment, life imprisonment or death, and the offender may in addition be sentenced to confiscation of property.

The Criminal Law and the Criminal Procedure Law of the People's Republic of China, Beijing: Foreign Languages Press, 1984, p. 230. (Exh. 9 hereto)

42. The death penalty has in fact been applied to economic criminals. A worker was executed for stealing 1,600 grams (about 56.5 ounces) of gold and 43,000 grams (about 1,518 ounces) of silver. A female worker was executed for stealing 148 tons of state petroleum. (See Zhang Zhiye, "Handling Crime Strictly According to Law—An Interview with the Vice-President of the Supreme People's Court," *Beijing Review*, Vol. 27, No. 17 (April 23, 1984), p. 20. Exh. 16.) Both cases were apparently handled in accordance with the amended Article 152 of the Chinese Criminal Law.

43. The Chinese criminal justice system rejects the Western principle of *Nulla poena sine lege* (no punishment without a pre-existing prohibitory rule). Therefore, even if charges against a criminal defendant are not directly covered by existing proscriptions, the Chinese authorities can invoke the "analogy provisions" of Article 79 of the Chinese Criminal Law to make the offense punishable. Article 79 provides:

> *Article 79.* A crime that is not expressly stipulated in the Special provisions of this Law may be determined and *punished according to the most closely analogous article* of the Special Provisions of this Law, but the matter shall be submitted to the Supreme People's Court for approval. (Emphasis added)

(Exh. 9 hereto)

44. In my opinion, the Chinese criminal law provision that is most analogous to the Hong Kong crime of false accounting (which I have reviewed) is Article 167.

45. A major crackdown on "lawlessness" was launched in China in 1983. The emphasis was on both violent crime and economic crime. As part of this crackdown on lawlessness, the expanded use of the death penalty resulted in the execution of between 5,000 and 10,000 defendants. *Country Reports for*

Human Rights for 1985, compiled by the U.S. Department of State, February 1986, p. 738. (Exh. 12C hereto)

46. Amnesty International in a 1984 publication discussed the marked increase in the use of the death penalty since the start of the "campaign against crime" in August 1983:

> The death penalty is used extensively in the People's Republic of China. The laws provide for it to be imposed as a punishment for a number of political offences, as well as for ordinary criminal offences. The crimes most often punished by death are murder, rape, and robbery resulting in death or serious injury. However, since 1981 the number of offences carrying the death penalty has doubled, and people can now be executed for a wide range of offences, including theft, bribery, embezzlement, organizing a secret society, molesting women, gang fighting, drug trafficking, pimping or "passing on methods of committing crimes".
>
> Legislation has been adopted on several occasions since 1982 not only to increase the number of offences punishable by death, but also to speed up proceedings in death penalty cases. The procedures for trial, appeal, review of sentence and execution have all been accelerated. Amnesty International expressed its concern in 1981 at the marked increase in the number of death sentences and executions after a decree was adopted which ended the review of all death sentences by the Supreme People's Court. Since then, other changes in legislation have resulted in further increases in the use of the death penalty.

Amnesty International, *China, Violations of Human Rights* 53 (1984). (Exh. 15 hereto)

47. The death penalty has been applied inconsistently in the past by the PRC government. If conditions were to change, for example, if the incidence of economic crimes in Southern China was to increase because of the perceived capitalist influence from Hong Kong, there is the possibility that China may further increase the use of the death penalty for economic crimes. Under such circumstances, the crimes set forth in Article 167 may be encompassed within the scope of the death penalty.

CONCLUDING OBSERVATIONS

48. China has not entered into an extradition treaty with either the United States, nor, to my knowledge, have negotiations begun between the two countries concerning the drafting of such an extradition treaty. *Treaties in Force*, January 1, 1986, compiled by U.S. Department of State, pp. 34-35. (Exh. 17 hereto.)

49. Because of the peculiar features of the Chinese legal system as described above, it is impossible to give definite answers to several vital questions relating to prisoners incarcerated in Hong Kong when China assumes control in 1997, such as whether after 1997 China would retry them or move them to other parts of China.

50. Although China has agreed with the United Kingdom to maintain Hong Kong's capitalist system and life style for 50 years after 1997, there is no credible arrangement to guarantee the implementation of the 1984 Sino-British Joint Declaration.

51. The future of post-1997 Hong Kong will depend on the stability of the Chinese political system, the continuity of current pragmatic policies in the post-Deng Xiaoping period, and the progress of the modernization and economic reform program in China.

52. In the 37 years since the founding of the PRC, the Chinese political system has not been stable. The instability in the political system has led to great swings in the Chinese attitude towards the existence and enforcement of laws. In the 1950's, the Chinese government emphasized the development of the rule of law. In the late 1950's, this policy abruptly changed. Lawyers were branded as "rightists" and persecuted and deemed to be tools of the former bourgeoisie ruling class. By the early 1960's, law had fallen into disfavor, many laws were ignored or repealed, and all law schools were closed. During the Cultural Revolution (1966-1976) the government officially encouraged "lawlessness and the rule of the masses." It is only since approximately 1979 that China has re-emphasized regularity and the rule of law in the resolution of disputes and social problems.

53. Early this year, Deng Xiaoping's heir-apparent, Hu Yaobang, Secretary-General of the Chinese Communist Party, was forced to resign. Gargan, *Leader of Party in China is Ousted for His Mistakes*, The New York Times, January 17, 1987, pp. 1, 4 (Exh. 18 hereto). Who will succeed Deng is now uncertain, and a power struggle is currently underway. *See, e.g.,* Butterfield, *U.S. Sees Setback for China's Plans of Modernization*, The New York Times, January 15, 1987, pp. A1, A11 (Exh. 19); Southerland, *Deng 'Net Loser' in Chinese Turmoil*, The Washington Post, February 7, 1987, pp. A1, A12; (Exh. 20); *China, Battle of the Octogenarians,* Time, March 9, 1987, p. 50 (Exh. 21) and Woodruff, *China replaces young, liberal security chief,* The Sun, April 12, 1987, pp. 1A, 2A. (Exh. 22) How political change in China, either pre- or post-1997, would affect the implementation of the Sino-British Joint Declaration and the treatment of criminal defendants and prisoners present in Hong Kong on July 1, 1997, is a question which cannot be answered in a definite way now.

AUTHENTICATION OF DOCUMENTS

54. I have attached to this declaration as Exhibits 1-22 true and correct copies of the relevant portions of the various documents and articles referred to in the body of my declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Baltimore, Maryland, on July 10, 1987.

/s/ PROFESSOR HUNGDAH CHIU
Professor Hungdah Chiu

/s/ SHIRLEY A. SELIN
Shirley A. Selin, Notary Public

My Commission Expires 7/1/1990

[Exhibits to Prof. Chiu's Affidavit are not reproduced in this Appendix]

APPENDIX U

IN THE MATTER of the Extradition Act 1870-1935 and the bilateral treaty between the United States of America and the United Kingdom

[Seal]

and

IN THE MATTER of a request by the Hong Kong Government for the Extradition of OEN Yin-choy alias James Semaoen alias James Semaun from the United States of America

AFFIRMATION OF LULU YUI

I, Lulu Yui, Woman Senior Inspector of the Commercial Crime Bureau of the Royal Hong Kong Police force, do solemnly and sincerely affirm and say as follows:

1. I am a Woman Senior Inspector with the Royal Hong Kong Police force and I am presently attached to the Commercial Crime Bureau. Since November 1986, I have been the case officer in the investigation conducted by the Commercial Crime Bureau into various offenses contrary to the Theft Ordinance Cap 210 Laws of Hong Kong, suspected to have been committed by OEN Yin-choy alias James Semaoen alias James Semaun in relation to the Union Bank of Hong Kong Limited.

2. On the 2nd of April 1987 at Central Magistracy, Hong Kong, I affirmed an affirmation before Warner Greville Bernard Banks, permanent Magistrate in Hong Kong, for use in proceedings then and now instituted in the District Court for the Northern District of California, whereby the Hong Kong Government is

requesting the extradition of the said OEN Yin-choy to Hong Kong to answer to criminal charges.

3. Further to the said affirmation and further to a request made by the District Court for the Northern District of California, pursuant to Article IX(2) of the Anglo-United States Extradition Treaty, for further information as to the manner in which certain affirmations submitted to the said Court in support of the said extradition request came into being, I now wish to state the following matters:

4. As I have stated in my affirmation dated 2 April 1987, I was the case officer in charge of the Union Bank investigation from November 1986. In my capacity as case officer, I did have to report on a daily basis to my then immediate superior, Chief Inspector Ip Lau-Chuen who was for the period September 1986 to February 1987 the officer in overall charge of the Union Bank investigation. When Chief Inspector Ip was transferred to the Interpol Bureau, Paris, France, in February 1987, I became the officer in overall charge of the Union Bank investigation.

5. I am fluent in both the Cantonese and English languages. I received my primary education at St. Theresa's Primary School, Kowloon, Hong Kong, and my high school education at the Maryknoll Convent School, Kowloon, Hong Kong. I graduated from the latter school at the age of 17. In both these schools all classes, save for classes in which the Chinese language was taught, were conducted in the English language; similarly all examinations, save for examinations in the subject of the Chinese language, were written in the English language. At the age of 17 years I attended York House School, Vancouver, B.C., Canada, where I received an additional one year of high school education. Between the ages of 18 and 22 years I attended the University of Western Ontario; I graduated from that university with a Bachelor of Science degree in Pharmacology and Physiology.

6. In February 1987, Chief Inspector Ip Lau-Chuen instructed Senior Inspector Ellis and myself, amongst other inspectorate rank officers, to prepare affirmations and affidavits for witnesses whose evidence was believed to be relevant to a request that, it was then anticipated, would shortly be made to the United States of America for the extradition of Oen Yin-Choy to Hong Kong. I was to be personally involved in the preparation of the affirmations of the following witnesses:

OR Mui-chu
Yeung Yun-tong
Lee Yue-wing
Ching Hon-kuen
Lee King-mo
Lai Kwo-pui
Tsang Fung-kwan
Chung Lin-shing
Wong Mui
Liu Shih-kun

All these witnesses had by March 1987 provided statements in the Chinese language. These statements had been translated into the English language by either police interpreters or Chinese language officers. I was earlier instructed by Chief Inspector Ip Lau Chuen that all affirmations of witnesses in the case were to be prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

7. In the course of preparing affirmations for the above- listed witnesses, further information on the case generally was made available to me as a result of the ongoing police and accountancy investigations. It therefore became necessary to further interview and discuss the case with a number of the above-listed witnesses, prior to compiling their affirmation. These further interviews and discussions were carried out with a view to clarifying, seeking amendments as necessary, or additions to the witnesses' earlier statements. At the time of such further interviews and discussions with the witnesses I made notes of any clarifications, amendments or additions to the earlier statements that the witnesses indicated

they wished to make. When I came to prepare the affirmations or affidavits for these witnesses, I incorporated any such clarifications, amendments or additions that the witness had made into the English affirmation. Thus it is that the contents of the English affirmations of these witnesses are not identical to the English translations of the original Chinese statements taken from these witnesses.

8. In relation to the affirmation signed by Lee Yue-wing, subsequent to his third statement being translated into English, I discussed that statement and its contents with him on three occasions. These discussions led to amendments, clarifications, and additions being made to his final statement. These amendments, clarifications, and additions were then incorporated by me into the English affirmation that he signed on the 1st of April 1987. Prior to Lee Yue-wing signing the affirmation, I made arrangements for the affirmation to be orally translated to him in Cantonese by a Chinese language officer, Choi Chow Wai-Chun. I made arrangements for the affirmation to be handed to the Chinese-language officer well in advance of the time set aside for its oral translation to Lee Yue-wing. I made such arrangements in order that the Chinese language officer would have adequate time to peruse the document and prepare for the oral translation.

9. In relation to the affirmation signed by Or Mui-Chu subsequent to her statement being translated into English on the 7th of February, 1987, I discussed the contents of that statement with her on one occasion. This discussion led to amendments, clarifications, and additions being made to her statement. These amendments, clarifications, and additions were then incorporated by me into the English affirmation that she signed on 2 April 1987. Prior to signing the affirmation, I made arrangements for the affirmation to be orally translated in Cantonese to Or Mui-Chu by a Chinese language officer, Choi Chow Wai-chun. I similarly made arrangements for the affirmation to be handed to the Chinese language officer well in advance of the time set aside for the oral translation. I made such arrangements in order that the Chinese language officer would have adequate time to peruse the document and prepare for the oral translation.

10. In relation to the affirmation signed by Liu Shih-kun, I am able to say that the contents of this affirmation came about as a result of an interview held by me with Liu Shih-kun in the last week of March 1987 at the offices of the Commercial Crime Bureau, Hong Kong. As the information that this witness was able to provide in relation to the Union Bank case was extremely brief, I subsequently prepared an affirmation in the English language for this witness from the notes of the contents of the interview. From my fluency in the English and Chinese languages, I have no doubt that the contents of this affirmation reflect fully the matters covered in the interview that I held with Liu Shih-kun. Prior to signing the affirmation, the affirmation was orally translated into Cantonese to Liu Shih-kun by the Chinese language officer, Choi Chow Wai-chun. This witness in fact pointed out to me an error that appeared in paragraph 4 of the affirmation. A correction was therefore made prior to his signing the affirmation.

11. In relation to the affirmations signed by Yeung Yun-tong, Wong Mui, Ching Hon-kuen, Chung Lin-shing, Lee King-mo, Lai Kwo-pui and Tsang Fung-kwan, I am able to say that I prepared the affirmations for these witnesses based on the English translations of the Chinese statements made by these witnesses. The original Chinese statements were then also available to me. In preparing these affirmations, I did, on occasions, as a result of my fluency in English, alter the grammatical form of individual sentences and, on occasions, I altered the order of the paragraphs from the English translation of their statements in order that the subject matter of the affirmations should progress in a coherent manner. I did not, however, change the meaning or sense of the content of the translated versions of their statements in any way.

12. Each of the affirmations referred to in paragraph 11 was orally translated into Cantonese to the individual affirmant by the Chinese language officer Choi Chow Wai-chun, prior to the individual affirmant signing his or her affirmation. In each case, I made arrangements that the affirmations be handed to the Chinese language officer well in advance of the time set aside for translation. I made such arrangements in order that the Chinese

language officer would have ample time to peruse the documents and prepare for their subsequent oral translation.

13. This affirmation in the English language consisting of eight pages has been read over by me. It is true and accurate to the best of my knowledge and belief. I have made it knowing that the making of a false statement is a criminal offense punishable in Hong Kong under Section 33 of the Crimes Ordinance, Cap 200 Laws of Hong Kong.

/s/ LULU YUI
Lulu Yui

Affirmed by the said Lulu Yui at the British Consulate, San Francisco this 14th day of August, 1987 before me, Teresa R. Perrett, British Vice-Consul at San Francisco, California

/s/ TERESA R. PERRETT
BRITISH VICE-COUNSUL
BRITISH-CONSULATE
GENERAL
SAN FRANCISCO

[Seals]

APPENDIX V

IN THE MATTER of the
Extradition Act 1870-1935
and the bilateral treaty
between the United States
of America and the
United Kingdom

and

IN THE MATTER of a request
by the Hong Kong Government
for the extradition of
OEN Yin-choy
James Semaun alias
James SEMAOEN from the
United States of America

/s/ M. D. HILL
Magistrate in and for the
Crown Colony of Hong
Kong

Affidavit of IP Lau-chuen

I, IP Lau-chuen, Chief Inspector of Interpol Section of the Royal Hong Kong Police Force do solemnly and sincerely swear and say as follows:—

1. I am a Chief Inspector with the Royal Hong Kong Police Force currently posted to Interpol Paris. I am fluent in both the Chinese and English languages. From November 1982 to March, 1987, I was posted to the Commercial Crime Bureau. Between the period of September, 1986 and March 1987, I was the officer in overall charge of a police investigation into the affairs of the Union Bank of Hong Kong Limited (hereinafter called UB). I now swear this affidavit as I am informed that the District Court for the Northern District of California, pursuant to the provisions of Article IX(2) of the Anglo-United States Extradition Treaty, has requested further information as to the manner in which certain affirmations, submitted to that Court in support of a request by the Hong Kong Government for the Extradition of

OEN Yin-choy to Hong Kong, came into existence in the English language.

2. As the officer in overall charge of this case, I was responsible for the planning and conducting of the investigation into UB. Working under my direct command were five Detective Inspectors including Women Detective Senior Inspector Lulu YUI, one Detective Sergeant and ten Detective Police Constables. They reported directly to me. In relation to the UB investigation, I assigned Senior Inspector Lulu YUI as the case officer. In February 1987, Senior Inspector Lulu YUI was appointed Officer in Overall Charge of the case following my receipt of instructions that I was to proceed to Paris, France to take up a position with Interpol.

3. The area of investigation concentrated on loans made by UB over a period from January 1980 to December 1984. These loans were allegedly extended to Indonesian borrowers who subsequently defaulted on the repayments of interest and principal.

4. In order to investigate the manner in which the loans had been made and as to the flow of funds the accounting firm of Ernst and Whinney were invited by the Attorney General to conduct an accounting investigation.

5. Based on draft reports of Ernst & Whinney it was necessary to take a number of statements from UB staff and persons who had placed off-shore fixed deposits with UB. A number of these statements were taken in the Chinese Language. The reason for this was because some bank staff, although able to speak and read English, prefered [sic] to give their statements in the Chinese language, whereas some depositors did not speak fluent English.

6. I personally took some of these statements while others were taken by detectives, upon my instructions. Statements taken by detectives working under me were passed back to me for my information and consideration of the contents. As the officer in overall charge of the case these statements would be passed back to me as part of normal procedure.

7. During this type of investigation it is often necessary to interview a witness on a number of occasions. The interviews can

take the form of written statements, notes of interview or a discussion over a period of days resulting in a written statement, and this was the situation in this case.

8. Further interviews with individual witnesses were needed in this case because, often, following the initial interview, material came to light which required further investigation by the Commercial Crime Bureau and Ernst & Whinney to identify pertinent documentary exhibits.

9. Evidence elicited from the interview would then be recorded in the statement format. Whenever draft statements had been prepared they would be handed to the witnesses for them to make any correction, deletion or insertion, if they so required. The statements would then be finalized or rewritten if necessary prior to the witnesses signing them.

10. When a witness statement is recorded in the Chinese Language, it is necessary for the statement to be translated into the English language in order that English Police Officers can read the statement. The normal procedure for the translating of initial statements is that such transactions [sic] are prepared by Police interpreters. Police interpreters are civilians recruited by the Royal Hong Kong Police and they are responsible for translating documents from English into Chinese and Chinese into English. The qualifications for becoming a Police Interpreter are a school leaving certificate with credits in both Chinese and English, as well as at least three years' relevant experience in jobs involving either interpretation and translation work or the frequent use of written and spoken English. There are four levels of Police Interpreters, the most senior being Chief Police Interpreter, followed by Senior Police Interpreter, and the Rank I and Rank II Police Interpreter. At the Commercial Crime Bureau the section is headed by a Senior Police Interpreter and the remainder of the section are all of the Rank I Police Interpreter. All Police Interpreters prior to being posted to the Commercial Crime Bureau must have at least ten years experience as a Police Interpreter. When a document requires translation it will be handed to the Senior Police Interpreter who will allocate a Police Interpreter to translate the document. Once translated it will be handed back to the Senior Police Interpreter for his vetting; if no

corrections are required it will be returned to the officer in overal [sic] charge of the case. If corrections are required, these corrections will be made and the statement then handed back to the officer in overall charge of the case.

11. In addition to Police Interpreters, there is another category of interpreters available within the Hong Kong Government service. These persons are called Chinese Language Officers (hereinafter called "CLO") and work for the Chinese Language Division which comes under the Administrative and Services Branch of Government Secretariat. CLOs are university graduates who have experience in the translation of the Chinese language into the English language and the English language into the Chinese language. CLOs are posted to work in government departments with the responsibility to translate documents.

12. The Commercial Crime Bureau has a unit of 4 CLO's with a Senior Chinese Language Officer (SCLO) in charge of them. Due to the small size of the CLO unit, access to their services is highly limited. When access to the CLO unit is available, the normal procedure for translating a document is that the document will be passed to the SCLO who will assign a CLO to translate the document. Once translated the document will be passed back to the SCLO, who is responsible to ensure that the document has been accurately translated. If an inaccuracy in the translation is found then it will be passed back to the CLO for correction; once the SCLO is satisfied that the document has been accurately translated he will return the document to the officer in the overall charge of the case.

13. In the UB case, all statements that had been taken originally in the Chinese language were translated into the English language by either Police Interpreters or Chinese Language Officers. I then instructed officers of inspectorate rank to prepare affidavits or affirmations in the English language for these witnesses to swear or affirm based on the English translations of the witnesses' statements. To ensure that the witness agreed to the contents of the English affidavit or affirmation that he/she was swearing or affirming, I am aware that arrangements were made for the affirmation or affidavit to be orally translated into Cantonese to the respective witness by a CLO, prior to the witness

swearing or affirming the affidavit or affirmation before the Magistrate. If the witness wished to make any addition, alteration or clarification to the affidavit or affirmation, he or she had the opportunity to make such addition, alteration or clarification prior to swearing or affirming the affidavit or affirmation. Then the affirmation or affidavit is sworn or affirmed by the witness in front of a Magistrate in the presence of a qualified court translator who acts as an interpreter.

14. During the UB investigation statements were taken in the Chinese language from the following witnesses:

OR Mui-chu
YEUNG Yun-tong
LEE Yue-wing
CHING Hon-kuen
LEE King-mo
LAI Kwo-pui
TSANG Fung-kwan
CHUNG Lin-shing
WONG Mui

15. In the case of LEE Yue-wing's final affirmation he was interviewed over a period of time. He provided three statements in the Chinese language. The first statement was taken by Detective Police Constable 21562 on 14.11.86 and the second one was by Detective Sgt 17610 on 28.11.86. The third statement was taken by myself on 7.1.87 and was finalised on the 9.1.87. All these three statements were translated by Police Interpreters.

16. One statement in the Chinese language was taken from OR Mui-chu on 7.2.87 by myself. This was translated by a qualified Police Interpreter into the English language.

17. One statement in the Chinese language was taken from YEUNG Yun-tong on 17.12.86 by D/Sgt 17610, this statement was translated by a qualified Police Interpreter into the English language.

18. One statement in the Chinese language was taken from CHING Hon-kuen on 15.1.87 by myself. This statement was translated by a qualified Police Interpreter.

19. Three statements in the Chinese language were taken from LEE King-mo. The first statement was taken on 8.1.87 by Detective Sgt 17610 and the second statement was also taken by Detective Sgt 17610. The third statement was taken by myself on 5.2.87. All three statements were translated into the English language by a qualified Police Interpreter.

20. One statement in the Chinese language was taken from LAI Kwo-pui on 27.2.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified Police Interpreter.

21. One statement in the Chinese language was taken from TSANG Fung-kwan on 27.2.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified Police Interpreter.

22. One statement in the Chinese language was taken from CHUNG Lin-shing on 23.3.87 by Woman Detective Police Constable 15833. This statement was translated into the English Language by a qualified CLO.

23. One statement in the Chinese Language was taken from WONG Mui on 18.3.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified CLO.

Sworn by the said
IP Lau-chuen at the
Supreme Court,
Hong Kong, this 14th
day of August 1987

/s/ IP LAU-CHUEN

Before me

[Seal]

/s/ M. D. HILL
Magistrate in and for the
Crown Colony of Hong Kong

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 19, 1988]

OEN YIN-CHOY, Petitioner/Appellant, v. GLEN S. ROBINSON, United States Marshal for the Northern District of California, Respondent/Appellee.	No. 87-15055 [D.C. No. C-87-4705-RHS] [D.C. No. CR-87-0082-MISC RHS]

ADDENDUM TO
OEN YIN-CHOY'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
[F.R.A.P. 35 and 40]

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OEN YIN-CHOY

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E	Amnesty International Memorandum on the Draft Basic Law of the Hong Kong Special Administrative Region, July, 1988
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* * *

[Tab A is reproduced at Appendix Y. Articles 16, 169 and 172 of Tab B are reproduced at Appendix Z. Tab D is reproduced at Appendix AA. Portions of Tab F are reproduced at Appendix BB. Complete copies of the exhibits to this Addendum are part of the record in the United States Court of Appeals for the Ninth Circuit.]

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 28, 1988]

OEN YIN-CHOY, Petitioner/Appellant, v. GLEN S. ROBINSON, United States Marshal for the Northern District of California, Respondent/Appellee.	No. 87-15055 [D.C. No. C-87-4705-RHS] [D.C. No. CR-87-82-MISC-RHS]

SUPPLEMENTAL ADDENDUM TO
OEN YIN-CHOY'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
[F.R.A.P. 28(f) and F.R.C.P. 44.1]

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SUPPLEMENTAL ADDENDUM TO OEN YIN-CHOY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Oen Yin-choy submits this Supplemental Addendum to his Petition for Rehearing and Suggestion for Rehearing *En Banc*, pursuant to his Motion to File Supplemental Addendum, filed in this Court on this date.

Dated: October 28, 1988

CEDRIC C. CHAO
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER

By CEDRIC C. CHAO
Attorneys for
Petitioner/Appellant
OEN YIN-CHOY

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G	*Human Rights 'Missing from Draft of Law'*, South China Morning Post, December 8, 1987
H	*Human Rights Lacking in Draft*, South China Morning Post, January 12, 1988
I	*Basic Law Threatens Judicial Independence, Claim Lawyers*, South China Morning Post, March 6, 1988
J	*Treason Charges Likely Under Basic Law Draft*, South China Morning Post, April 3, 1988
K	*Draft With Many Flaws*, South China Morning Post, April 28, 1988
L	*Basic Law Leaves Many Doubts About China's Motives*, South China Morning Post, May 2, 1988
M	*Ford to Query Points in Draft*, South China Morning Post, May 3, 1988
N	*Breach of Promise?* Far Eastern Economic Review, May 12, 1988
O	*Some Basic Mistakes*, South China Morning Post, May 18, 1988
P	*Basic Law Fails to Provide for Human Rights*, South China Morning Post, May 21, 1988
Q	*Too Much Authority Invested in First SAR*, South China Morning Post, May 27, 1988
R	*SAR Courts Must Have Power 'To Guarantee Human Rights'*, Hong Kong Standard, June 6, 1988
S	*Bar Warns of Threat to HK Civil Liberties*, South China Morning Post, June 9, 1988
T	*Chief Justice Lists Potential Conflict Areas*, South China Morning Post, June 10, 1988
U	*First Thoughts on Basic Law*, Hong Kong Standard, June 10, 1988
V	*Basic Law Offers Little Protection of Civil Rights*, Hong Kong Standard, June 11, 1988
W	*Political View of the Draft*, South China Morning Post, June 11, 1988

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Y	*SAR Gov't Set-Up is China's Job: Drafter*, Sunday Standard, June 19, 1988
Z	*Cater Speaks Out for the Future of HK*, South China Morning Post, June 20, 1988
AA	*The Basic Law*, South China Morning Post, June 25, 1988
BB	*Exodus of HK Elite was Predictable*, South China Morning Post, June 27, 1988
CC	*Expert Opposes Draft's Civil Rights Provisions*, South China Morning Post, July 4, 1988
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EE	*Why Draft Sours Spirit of Joint Declaration*, Hong Kong Standard, July 15, 1988
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GG	*Basic Problems of Law*, Far Eastern Economic Review, August 11, 1988
HH	*Extradition Discussions Extended*, South China Morning Post, August 25, 1988
II	*Constitutional Contradictions Abound in a Sea of Confusion*, South China Morning Post, August 26, 1988
JJ	*Talks to Focus on Future Extradition Procedures*, South China Morning Post, August 28, 1988
KK	*Former Law Lord Criticises Initial Draft*, South China Morning Post, September 17, 1988
LL	*Tilted Balance of Power*, Sunday Standard, September 19, 1988
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[The exhibits to this Supplemental Addendum are part of the record in the United States Court of Appeals for the Ninth Circuit.]

APPENDIX Y

United States Senate
Washington, DC 20510

October 19, 1988

The Honorable George P. Shultz
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

The case of Oen Yin-choy, a 69-year old U.S. permanent resident in ill health who resides in California, has come to my attention. Mr. Oen is facing extradition to Hong Kong. I am writing to express concern about this matter and to request certain information relevant to it.

If Mr. Oen is convicted in Hong Kong, he is subject to being incarcerated there beyond July 1, 1997, the date on which the People's Republic of China regains control over the territory. On that date, if Mr. Oen is left imprisoned in Hong Kong, he would come under the jurisdiction of the PRC. Yet, I understand that the Ninth Circuit Court of Appeals in the case *Oen Yin-choy v. Glen Robinson*, issued an opinion on October 5, 1988, holding that the extradition of Mr. Oen to Hong Kong would not be in violation of Article XII(1) of the United States-United Kingdom Extradition Treaty. Article XII(1) provides that:

> [A] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State — (a) until after he has returned to the territory of the requested Party; or (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

The Ninth Circuit has apparently taken the puzzling view that the Extradition Treaty prohibits Hong Kong from extraditing Mr. Oen and others in his situation to the PRC, but permits a "surrender" of such persons to the PRC in 1997.

A very significant issue is raised by this case, for while I understand that we do not have an extradition treaty with the PRC, extradition of Mr. Oen at this time could effectively bring him within the PRC's jurisdiction. Certainly this fact, and the possibility that between now and 1997 others may face the same situation faced by Mr. Oen, requires careful consideration by the United States—both the Executive Branch and the Senate.

Unless the United States has been assured by the United Kingdom that, if Mr. Oen is sentenced to serve a term beyond July 1, 1997, he will be removed to the custody of the U.K. outside of Hong Kong prior to that date, then it would appear that Mr. Oen should not be extradited at this time.

I would appreciate receiving your comments relative to my concerns at your earliest convenience.

In closing, I want to note that I am not familiar with the charges against Mr. Oen. Nevertheless, as is the case with any one residing in the United States, legitimate questions of international law and U.S. treaty obligations deserve proper scrutiny in each case in which extradition is sought.

Thank you for your attention.

Sincerely yours,

/s/ PETE WILSON
PETE WILSON

PW:ig

APPENDIX Z

THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA

(For Solicitation of Opinions)

The Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

April 1988

* * *

Chapter II: Relationship between the Central Authorities and the Hong Kong Special Administrative Region

* * *

Article 16 The Hong Kong Special Administrative Region is vested with legislative power.

Laws enacted by the legislature of the Hong Kong Special Administrative Region shall be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any law of the Region is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retroactive effect.

* * *

Chapter IX: Interpretation and Amendment of the Basic Law

Article 169 The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.

When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government,

the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

* * *

Chapter X: Supplementary Provisions

* * *

Article 172 At the time of the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they can be annulled or revised according to the procedure as prescribed by this Law.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

APPENDIX AA

amnesty international

HONG KONG

SUMMARY OF COMMENTS PRESENTED BY AMNESTY INTERNATIONAL IN A MEMORANDUM ON THE DRAFT BASIC LAW

JULY 1988 SUMMARY AI INDEX: ASA 19/03/08
DISTR: SC/CO/GR

The attached paper is a summary of the main comments presented by Amnesty International in a memorandum on the Draft Basic Law of the Hong Kong Special Administrative Region. The memorandum reviews the Draft Basic Law which has been proposed as a "mini-constitution" when the People's Republic of China resumes sovereignty over Hong Kong on 1 July 1997. The memorandum was sent to the Basic Law Consultative Committee on 15 July and is available publicly (AI Index: ASA 19/02/88).

The memorandum, and the attached summary of comments, examine provisions of the Draft Basic Law which relate to the protection of fundamental human rights. They express Amnesty International's concern that the draft law offers insufficient protection against torture and arbitrary arrest and does not adequately guarantee the right to life and other fundamental rights, including freedom of expression and association and religious freedom.

The two papers also suggest ways that Hong Kong might continue to be afforded the protection of two major United Nations treaties on human rights which now apply to Hong Kong because of their ratification by the United Kingdom.

This summarizes a 4-page document, *The Draft Basic Law of the Hong Kong Special Administrative Region: Summary of comments presented by Amnesty International in a memorandum to the Basic Law Drafting Committee* AI Index: ASA 19/03/88, issued by Amnesty International in July 1988. Anyone wanting

further details or to take action on this issue should consult the full document.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 8DJ, UNITED KINGDOM

Amnesty International
International Secretariat
1 Easton Street
London WC1X 8DJ
United Kingdom

July 1988

THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

SUMMARY OF COMMENTS PRESENTED BY AMNESTY INTERNATIONAL IN A MEMORANDUM TO THE BASIC LAW DRAFTING COMMITTEE

Amnesty International's memorandum to the Basic Law Drafting Committee focuses partly on specific articles of the Draft Basic Law which appear to fall short of international human rights standards. It also focuses on the question of how Hong Kong can go on enjoying the protection of key international human rights treaties including the International Covenant on Civil and Political Rights (1966), after 1997.

Amnesty International is principally concerned:

(1) that persons in the Hong Kong region should continue to be protected by the fundamental provisions of the International Covenant on Civil and Political Rights;

(2) that they should be afforded clear protections against torture and other cruel, inhuman or degrading treatment or punishment;

(3) that they should be afforded protections for the right to life;

(4) that they should be guaranteed the right to fair trial;

(5) that they should be afforded those rights which will safeguard against the detention of prisoners of conscience; and

(6) that the Draft Basic Law should not include a limitation clause of such a general nature that it could be used to undermine all other human rights protections.

1. *The continuing application of the International Covenants*

The 1984 Sino-British Joint Declaration on Hong Kong stated that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966) "as applied to Hong Kong shall remain in force" after 1997. But the Draft Basic Law does not make clear how this will happen. Article 38 of the Draft Basic Law simply states that the provisions of the two Covenants as applied to Hong Kong "shall be implemented through legislation by the Hong Kong Special Administrative Region".

In Amnesty International's view there are two ways by which the Covenants, as applied to Hong Kong, can be kept in force:

(1) Firstly, Hong Kong can become a party in its own right to the two International Covenants.

Alternatively, the People's Republic of China (including the Hong Kong Special Administrative Region) can become a party to the Covenants. In this case, each of the periodic reports by the People's Republic of China to the Human Rights Committee (which is the committee established under the Covenant to monitor its implementation) would include a separate section about the Hong Kong Special Administrative Region presented by the Hong Kong authorities.

Amnesty International also believes that human rights in Hong Kong would be further strengthened by ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, which allows for individuals to bring complaints of alleged human rights violations to the Human Rights Committee.

(2) Additionally, Article 38 of the Draft Basic Law can be amended to provide that the terms of the two Covenants are a part of the law of the Hong Kong Special Administrative Region

and shall be implemented through both legislation and by action of the courts of the Hong Kong Special Administrative Region. By permitting the courts of the Hong Kong Special Administrative Region to enforce the terms of the Covenants, the people of the Hong Kong Special Administrative Region will be better assured that their rights are protected.

2. *Human rights and the Basic Law*

2.1 *Guarantees for fundamental rights*

Several fundamental human rights of concern to Amnesty International are not found in the Draft Basic Law. In Amnesty International's view these rights should be specifically guaranteed.

These rights include the right to protection against torture and other cruel, inhuman or degrading treatment or punishment, which have been condemned by the United Nations (UN) General Assembly as offences to human dignity. The Draft Basic Law does not include any such protection.

The Basic Law should incorporate specific safeguards against torture, such as those recommended by the Human Rights Committee in general comment 7(16) on Article 7 of the International Covenant on Civil and Political Rights (see page seven of Amnesty International's memorandum). The Basic Law could also incorporate by reference the provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which provides for specific measures to be taken by governments for protection against torture.

The Draft Basic law does not guarantee the right to life.

Amnesty International recommends that the Basic Law specifically protects the right to life by abolishing the death penalty. If this humanitarian step cannot be taken, at least the Basic Law should include an assurance that Hong Kong's current policy of not carrying out death sentences will be continued after 1 July 1997.

Although the Draft Basic Law contains a number of provisions directed towards the protection of the right to fair trial, these are

not as specific as those found in Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights.

Amnesty International recommends that the specific guarantees for fair trial of the International Covenant on Civil and Political Rights be incorporated by reference in the Basic Law.

The Draft Basic Law does not guarantee the right to be free from arbitrary arrest, detention or imprisonment and includes some provisions which pose significant risks to human rights defenders, journalists, religious teachers or leaders, politically active individuals, leaders of minorities, and others who might be imprisoned for the peaceful exercise of fundamental rights.

Amnesty International recommends that Article 27 of the Draft Basic Law incorporates a specific guarantee against arbitrary arrest or imprisonment; that Articles 17, 22 and 29 be reviewed to ensure that their provisions do not conflict with this guarantee; and that additional provisions be incorporated to guarantee the right of minorities and of religious freedom in accordance with the International Covenant on Civil and Political Rights.

2.2 *The limitations clause*

Article 39 of the Draft Basic Law includs a limitations clause of such a general nature that it could undermine some or all of the rights prescribed in the other provisions of the Draft Basic Law or in any additional clauses which might be added. Such a broad limitations clause could be used as a possible legal basis for nullifying all of the Fundamental Rights and Duties of the Residents in Chapter III of the Draft Basic Law.

The human rights provisions of the Basic Law would be greatly strengthened if Article 39 were replaced by specific reference to or incorporation of Article 4 and other provisions of the International Covenant on Civil and Political Rights which specify for each right the conditions, if any, under which it may be limited and those rights from which there can be no derogation.

2.3 *Enforcement of human rights guarantees*

Amnesty International considers that all the fundamental rights provisions of the Basic Law must be justiciable if they are to be effective, since even the most generously drafted guarantees for fundamental rights would be of little worth if they could not be enforced effectively by the courts. Thus it is important that the courts of the Hong Kong Special Administrative Region be given the power to review the compatibility of any legislation and official acts with the rights and freedoms guaranteed in the Basic Law.

The International Covenant on Civil and Political Rights also provides that individuals whose rights and freedoms have been violated shall have an effective remedy to challenge such violations, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2(3)).

Article 34 of the Draft Basic Law does guarantee Hong Kong residents the right to challenge executive acts in the courts, but it does not make clear whether such challenge may be based on the provisions of the Basic Law, as opposed to other laws. It also omits to mention challenge of legislative acts.

Amnesty International believes that these questions can be resolved by providing in the Basic Law that the courts of the Hong Kong Special Administrative Region have the power to review the compatibility of any legislation and official act with the rights and freedoms guaranteed in the Basic Law, and by giving individuals the right to challenge in court any violation of their basic rights and freedoms.

APPENDIX BB

THE BASIC LAW AND HONG KONG'S FUTURE

Edited by

PETER WESLEY-SMITH, BA, LLB (Adelaide), PhD (HK)
Professor, Department of Law, University of Hong Kong

ALBERT H Y CHEN, LLB, PCLL (HK), LLM (Harvard), Solicitor
Senior Lecturer, Department of Law, University of Hong Kong

Butterworths
Hong Kong - Singapore - Malaysia
1988

* * *

[p. 76] PROBLEMS AND DIFFICULTIES

Up to the end of April 1988, the Hong Kong experience may be said to contain three main parts, namely, the Sino-British negotiations, the drafting of the SAR Basic Law, and the events associated with the British Hong Kong government's efforts to introduce a more representative government in the territory. The first is a matter of international diplomacy while the last two are domestic affairs within the jurisdiction of the PRC government and the British Hong Kong government respectively. Pertinent problems and difficulties that have surfaced include the following.

In the beginning, many observers discovered that few Beijing leaders had a realistic and accurate understanding of Hong Kong. Those accustomed to viewing the world from the perspective of the Chinese middle kingdom or Marxist philosophy seemed to be equally ignorant and self-righteous in their opinions about how a capitalist colony like Hong Kong could best be governed. This scared quite a number of the Hong Kong elite. There was much anxiety, and remedial lobbying (or educating) efforts were undertaken by leading figures in the early stage of the negotiations. Fortunately, the leaders in Beijing were wise enough to put those in the know in key positions to deal with the British and Hong Kong representatives so that the damage was not too great.

Next, the people of Hong Kong were frustrated because they could not take part in the negotiations which were to decide their own fate.[9] Both the British and the Chinese claimed that they [p. 77] represented the interest of the Hong Kong people, but in fact the last were over-represented in some areas and inadequately represented in others. Throughout the whole process, they could only traverse the halls in Beijing and London to lobby the two negotiating parties. This they did to their own potential peril

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[9] Some people in Hong Kong put forward the 'three-legged stool' argument. Some also argued that 'residual power' should rest in the Hong Kong people. Both groups were frustrated. For a summary of public opinion polls and representative samples of the views of major groups and the media in Hong Kong during the Sino-British negotations, see Joseph Y S Cheng (ed), *Hong Kong in Search of a Future* (Hong Kong: Oxford University Press, 1984).

since such actions reflected their locus of loyalty and could affect their future careers. Had Hong Kong been negotiating for post-colonial arrangements on its own as many former British colonies have done, the situation would certainly have been different.

The Hong Kong people would later be reminded time and again by mainland sources that the British would return sovereign authority of Hong Kong to the PRC, not to them. The future government of the SAR would be directly under the Central People's Government. Its power would come from the NPC, not from the people of Hong Kong. Hence, whatever the NPC chose not to authorise, the SAR government could not do. The people of Hong Kong are not sovereign and therefore enjoy no legal powers other than those granted to them by the Basic Law.

Third, the Joint Declaration, with its 12-point statement and 14 items of concrete explanations, constitutes Beijing's new Hong Kong policy.[10] It has been welcomed by the people of Hong Kong. Yet, the people of Hong Kong have also learnt that the said document is somewhat less than the international guarantee that they had hoped for. A joint declaration is more an announcement of intention rather than a binding treaty with provision of clear obligations that the parties must perform. However, that is not the real problem. What is pivotal is that the document amounts to a mere unilateral declaration of policy by the PRC towards the Hong Kong people. In the words of a Beijing legal authority,[11] 'the British pledged to return Hong Kong to the PRC, but the PRC made no pledge to the British.' Should Beijing renege on its promises later, the British government would be in no position to help the people of Hong Kong other than to give moral support.

Fourth, Beijing has promised, among other things, a highly autonomous SAR in which Hong Kong people will rule over Hong Kong. However, the drafting process and the provisions of the Basic Law have shown that Beijing's rulers have no intention of creating a truly autonomous Hong Kong-run SAR. The BLDC membership is predominantly mainland Chinese. Even the Con-

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[10] See n 6 above.

[11] See *Kuai Bao*, 25 September 1984.

sultative Committee, which is meant to be representative of the Hong Kong public, operates under the control of an [p. 78] Executive Committee 'elected' in a forced, clearly undemocratic fashion amidst loud protests.[12] There has been no lack of debates. Dissident opinions are allowed an airing but there is no doubt as to the outcome regarding an issue where Beijing has expressed a clear view.

As to the articles of the Basic Law, the following points obviously indicate potential central control or intereference in the affairs of the SAR, contrary to the promise of a high level of autonomy.[13]

(1) The government design clearly favours a strong Chief Executive who will dominate the other branches of the SAR government but who will be under the control of Beijing. The CE, as he or she appears in the Basic Law, resembles the powerful British colonial Governor of Hong Kong who is by law accountable only to London, not to anyone in Hong Kong.

The CE shall be appointed by the CPG on the basis of the results of elections or consultations to be held locally. Beijing, with the co-operation of some Hong Kong business elite, will be able to manipulate and to control the process of producing the CE. His or her appointment by the CPG is not likely to be just a pro forma exercise (BL14, 45 and Annex I, BL).

There will be an Executive Council to assist the CE in policy-making. Its members are appointed by and responsible only to him or her (BL54-56).

The principal officials of the various departments of the SAR executive authorities shall be appointed by the CPG upon nomination by the CE. Some critics are asking whether the scope of 'principal officials' designated in the Basic Law has expanded beyond what is described in the Joint Declaration (BL48(5)).

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[12] See Yu Jiwen, 'Consultative Committee: Established to Control the Popular Will?' 192 *Jiushi Niandai* 46-49 (January 1986).

[13] The following points have all been derived from the Basic Law of the SAR.

(2) The CE shall be 'responsible to the Central People's Government and the HKSAR.' (In that order?) The question is raised as to why the CE is made responsible to the 'HKSAR' and not to its Legislative Council (BL43).

Among other duties, the CE is 'to execute the directives given by the CPG in respect of matters provided by this law' (BL48(8)). Presumably, he or she is to do so without questioning them on any ground.

(3) The CE shall have the power to return a bill passed by the Legislative Council for reconsideration. Furthermore, he or she can dissolve the legislature with the approval of the CPG (BL49, 50).

[p. 79] It is also proposed to give the CE the power to control the introduction of bills by members of the Legislative Council (BL73, alternative 1).

(4) The SAR legislature can move to impeach the CE only on two grounds: serious breach of law or dereliction of duty. The impeachment procedures require one-fourth of all members to move it and two-thirds of all members to agree to it. Even then, such a proposal 'shall be reported to the Central People's Government for decision' (BL72(9)).

Under certain circumstances, the Legislative Council can also force the CE to resign. But this is possible only when he or she has dissolved the Legislative Council, and the newly elected legislature (a) still passes the original bill, which the CE had refused to sign twice, with a two-thirds majority; or (b) still refuses to approve the budget or to pass an important bill proposed by the CE (BL52(2), (3)).

(5) The question whether the CE should be the presiding officer of the legislature is still to be decided (BL70). However, the President of the Legislative Council shall be vested with the power to 'announce that a member of the Legislative Council will no longer be qualified for such an office' under certain conditions. Such conditions include the member's inability to discharge the functions of his or her office due to serious illness 'or other reasons' (BL78).

The proposed system, in spite of its checks-and-balance mechanisms, clearly subordinates the Legislative Council, which is more likely to be Hong Kong-oriented, to the CE, who is likely to be Beijing-oriented, in terms of their power relationships.

(6) Laws enacted by the SAR legislature shall be reported to the Standing Committee of the National People's Congress for the record, and if the latter considers that such laws are 'not in conformity with this Law or legal procedures,' it may return them for reconsideration or revoke them (BL16).

(7) The power of interpretation of the Basic Law shall be vested in the NPCSC. Such interpretations are binding on the SAR courts. These courts may interpret only those articles of the Basic Law which are within the scope of the SAR's autonomy and only when they are adjudicating cases (BL169).

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[p. 218] International covenants (BL38)

Specific reference to the two International Covenants in the Joint Declaration aroused a fervent hope that Hong Kong will, for the first time, have a constitutional code of human rights commensurate with international standards. At the same time, critics had not been slow to point out that the two covenants, as international treaties, were not enforceable in the domestic courts.[30] They have to be implemented by the local legislature. There is almost unanimous support by writers in Hong Kong for the entrenchment of at least the International Covenant on Civil and [p. 219] Political Rights by giving it legal effect through the Basic Law. It was a great disappointment when the drafters failed to live up to this expectation.

The earlier draft of BL39 was almost a replica of the relevant provision of the Joint Declaration, which shows no intention to entrench the International Covenants at all. It was only under pressure from the legal profession that some cosmetic modifications were made. The present BL39 requires the SAR to imple-

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[30] See J Chan 'Basic Law and the International Covenant' in A Chen and J Chan (n 3 above) and references in J Chan, 'A Bill of Rights for Hong Kong?' in R Wacks (ed), *Civil Liberties in Hong Kong* (n 19 above) at n 5 thereof.

ment through legislation the provisions of the International Covenants as applied to Hong Kong. To the credit of the drafters, this is more positive than its predecessor. Nevertheless, unless and until such legislation is perfected, the International Covenants are not fully enforceable in our local courts. Even when such laws are in force, being ordinary laws made by the local legislature they are not entrenched and are themselves subject to repeal. It seems that the BLDC never intended to entrench the International Covenant in the Basic Law. What was envisaged was that the provisions of the International Covenants have been or will be transformed into local law. Thus the provision on the inherent right to life is regarded to have been implemented by the law on the offence of murder. The drafters defended their stand by pointing out that this is the existing system.

With respect, this is a disappointingly short-sighted and unimaginative approach. The drafters were charged with a task which was unprecedented. The object of chapter III is to ensure effective protection of human rights after the change of sovereignty (or its exercise). The relevant consideration for the drafters should be whether entrenchment would afford better protection of human rights. They should not be tied down by the existing system. Retention of the present system in this regard means that implementation of the International Covenants would depend very much on the initiative and perceptions of the executive; such implementation would necessarily be in an ad hoc, reactive, and piecemeal fashion. The British experience in protecting civil rights by way of such piecemeal, ad hoc legislation has resulted in the UK's distinguished record under the European Convention of Human Rights: for many years it has been the country receiving the largest number of complaints of violations of the European Convention and with the largest number of judgments entered against it!

It is regrettable that the drafters did not see fit to exploit the wisdom and meticulous drafting of the International Covenants, the drafting of which took almost two decades. In terms of clarity, comprehensiveness, and detail, the provisions on substantive rights in chapter III compare poorly with the International Covenant on Civil and Political Rights. There is no [p. 220]

reference to the right to life,[31] the right not be be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, the right not to be subjected to medical or scientific experimentation without free consent, the right not be be held in servitude, the right to privacy, or the right to non-discrimination in the enjoyment of fundamental rights and freedoms. The extensive procedural safeguards for a person who has been lawfully arrested are reduced to minimum brevity in BL86. There are no restrictions on derogation of fundamental rights in times of emergency. It is not clear whether freedom of speech under BL26 includes the right to seek and receive information and ideas of all kinds. Nor is it clear, ironically, whether freedom of religious belief includes freedom to preach in private!

This is not to undermine the hard work of the drafters in the last two years. The easiest way to remedy these defects is to give legal effect to the International Covenants. Despite repeated calls from lawyers and academics, the drafters still refused to entrench the International Covenants, this time by referring to drafting difficulties. With respect, there are at least three different formulae which have been proposed, and technicality is no excuse at all. Because of the different nature of the rights involved, the two covenants should receive slightly different treatment. It is submitted that BL38 be replaced by the following article:

> The provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall be enforceable in the courts of the Hong Kong Special Administrative Region and shall, to the extent of inconsistency, prevail over any law of the Hong Kong Special Administrative Region.
>
> The provisions of the International Covenant on Economic, Social, and Cultural Rights as applied to Hong Kong shall be implemented, and if apppropriate, through legislation, by the Hong Kong Special Administrative Region.

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[31] The right to life was considered and rejected by the sub-group on the ground that it might prohibit the death penalty, a subject on which there is no public consensus.